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# **“We Don’t Want Dollars, Just Change”:<sup>1</sup> Narrative Counter-Terrorism Strategy, an Inclusive Model for Social Healing, and the Truth About Torture Commission**

**Kim D. Chanbonpin\***

## **ABSTRACT**

*In 2007, Professor Eric K. Yamamoto acknowledged that reparations theory and practice had reached a crossroads and called for a new strategic framework that reparations advocates could utilize in working to achieve redress for social and historical wrongs. This Article attempts to answer Yamamoto’s call. In it, I situate my proposal for a truth commission to redress the post-9/11 torture program in a new Inclusive Model for Social Healing. In the past, reparations advocates have relied on litigation—a strategic model that excludes participants other than the named parties—to obtain redress. By increasing the number of stakeholders in a reparations scheme, the Inclusive Model for Social Healing has the potential to attract more widespread support from the public and is more resilient to criticism than exclusive litigation models.*

*A truth commission that would provide some measure of redress for those who have suffered from the post-9/11 torture program is a critical testing ground for this new model, especially as judicial avenues for relief appear to have been blocked. The federal courts have consistently dismissed civil actions alleging torture and other brutal treatment brought by former detainees against government officials. Attorney General Eric Holder does not seem keen on pursuing charges against CIA agents operating under the Torture Memos, so recourse in criminal court appears to be likewise unavailable. Finally, despite concluding that the authors of the infamous Torture Memos had relied on flawed legal reasoning, the Office of Professional Responsibility’s February 2010 report forecloses the possibility that John Yoo, Jay Bybee, and other Justice Department lawyers will be subject to disciplinary action for creating the torture program. The time to press for alternative forms of redress is now.*

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<sup>1</sup> This slogan appears on fundraising t-shirts printed by the Los Angeles, California chapter of AnakBayan, an international youth-based political activism organization. See ANAKBAYAN LOS ANGELES, <http://anakbayanla.org/> (last visited Jan. 31, 2010).

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*The Inclusive Model for Social Healing is well-suited for the problem that currently faces the nation as it begins to confront the reality that in order to win the military battle against al-Qaeda and other Islamist terrorist groups, it must first win the ideological battle for hearts and minds. The narratology of Islamist terrorist organizations relies on a cosmology that separates actors into two categories—"us" or "them." While U.S. leadership has submitted to a similar world view in the past, it must reject exclusive categorizations like this. The Inclusive Model for Social Healing directly confronts the exclusive terrorist ideology and provides an alternative narrative of inclusion premised upon social healing.*

*Vignette One*

- ¶1 “When it was my turn to be taken out of the plane, I could just see [some of my surroundings] from the corner of the goggles I was wearing. When I saw the American flag, I thought, ‘We’re in America now. They’re going to treat me well here.’”<sup>2</sup>

*Vignette Two*

- ¶2 “I don’t think people can imagine what it’s like. . . . You’d be laying in bed and mortars were going off all over the place. The infantry brings you somebody and they tell you that this is the guy who’s shooting mortars at you. Scaring him with a muzzled dog doesn’t seem like the worst thing in that situation . . . I mean I was willing to try it. I didn’t know that it wasn’t going to work.”<sup>3</sup>

*Vignette Three*

- ¶3 On November 5, 2009, Nidal Malik Hasan, a U.S. Army major and psychiatrist, entered his workplace, bowed his head, and then began shooting, reportedly shouting “Allahu Akbar”<sup>4</sup> as he expended almost 100 rounds of ammunition.<sup>5</sup> Major Hasan is currently awaiting a court-martial where he is charged with thirteen counts of premeditated murder and twenty-three counts of attempted premeditated murder.<sup>6</sup> In the aftermath of this tragedy, police and military officials, the media, victims, and Hasan’s own family were left asking how and why did this happen? After all, Hasan was a citizen, native-born, a member of the U.S. armed services, and a trained clinical psychiatrist who spent his professional life counseling troubled soldiers.<sup>7</sup>

<sup>2</sup> LAUREL E. FLETCHER & ERIC STOVER, *THE GUANTÁNAMO EFFECT: EXPOSING THE CONSEQUENCES OF U.S. DETENTION AND INTERROGATION PRACTICES* 40 (2009) (quoting an unnamed former prisoner housed at the U.S. Naval Station at Guantánamo Bay, Cuba, describing his reaction upon his arrival there).

<sup>3</sup> John Conroy, *Confessions of a Torturer: An Army Interrogator’s Story*, CHICAGO READER, Mar. 1, 2007, <http://www.chicagoreader.com/chicago/confessions-of-a-torturer/Content?oid=924419> (quoting former U.S. Army interrogator Tony Lagouranis regarding his military service in Iraq). In 2007, Lagouranis published his own account of his experience as a U.S. Army interrogator in Iraq. TONY LAGOURANIS & ALLEN MIKAELIAN, *FEAR UP HARSH: AN ARMY INTERROGATOR’S DARK JOURNEY THROUGH IRAQ* (2007).

<sup>4</sup> Professor Michael Sells translates “Allahu Akbar” into English as “Allah or God is most great.” MICHAEL ANTHONY SELLS, *APPROACHING THE QUR’AN: THE EARLY REVELATIONS* 167 (2d ed. 2007).

<sup>5</sup> James C. McKinley Jr. & James Dao, *After Years of Growing Tensions, 7 Minutes of Bloodshed*, N.Y. TIMES, Nov. 9, 2009, at A1, available at 2009 WLNR 22406379.

<sup>6</sup> Clifford Krause, *Defendant in Court for Hearing at Ft. Hood*, N.Y. TIMES, Oct. 13, 2010, at A12, available at 2010 WLNR 20433921.

<sup>7</sup> Nidal Malik Hasan was born and raised in Arlington, Virginia and enlisted in the Army directly after his college graduation. McKinley Jr. & Dao, *supra* note 5. When his Palestinian parents, who had expected him to join the family restaurant business, expressed their misgivings, Hasan told them: “No, I was born and raised here, I’m going to do my duty to the country.” James Dao, *Told of War Horror, Gunman Feared Deployment*, N.Y. TIMES, Nov. 6, 2009, at A1, available at 2009 WLNR 22219702. He went to medical school while in the Army and was trained as a psychiatrist. *Id.* However, Hasan’s military service did not provide insulation from the religious bias against Muslims that only increased after September 11, 2001. *Id.*

While serving in the Army, Hasan experienced anti-Muslim harassment directed at him by fellow soldiers. *Id.* In August 2009, just three months before the Fort Hood tragedy, another soldier was charged with vandalizing Hasan’s car; the suspect was motivated by a religious bias against Muslims. McKinley Jr.

## I. INTRODUCTION

¶4 Prior to the tragedy at Fort Hood, Nidal Hasan had expressed the belief—shared by other Muslims across the globe—that the U.S.-led wars in Iraq and Afghanistan are wars against all Muslims.<sup>8</sup> Leaders in al-Qaeda and other radical Islamist terrorist groups exploit this perception by invoking verses from the Qur'an and excerpts from the hadith (examples of behavior and sayings attributed to the Prophet Muhammad) that appear to support the proposition that all Muslims must heed the call to violent action when any group of Muslims is attacked.<sup>9</sup> And, instead of challenging the divisive “us versus them” narrative that cleaves Muslims from U.S.-led efforts against Islamist terrorists, leaders in the United States have further entrenched the scissure with an exclusive and exclusionary rhetoric. In a speech to world leaders on November 6, 2001, for example, President George W. Bush declared: “You’re either with us or against us in the fight against terror.”<sup>10</sup>

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& Dao, *supra* note 5. Meanwhile, Hasan struggled with his allegiance to his faith and his loyalty to his country.

In 2007, Major Hasan presented a talk to other Army doctors entitled “The Koranic Worldview As It Relates to Muslims in the U.S. Military.” See Nidal Malik Hasan, *The Koranic Worldview as it Relates to Muslims in the U.S. Military*, WASH. POST, June 2007, <http://www.washingtonpost.com/wp-dyn/content/gallery/2009/11/10/GA2009111000920.html> (depicting Major Hasan’s powerpoint slide presentation given to military doctors). In it, he appears to have been negotiating a personal compromise between loyal military service and his Islamic faith. See *id.* One slide asserted that it was “getting harder and harder for Muslims in the service to morally justify being in a military that seems constantly engaged against fellow Muslims.” *Id.* at 11. The presentation quoted a litany of Qur’anic verses, and concluded with Hasan’s recommendation that Muslim soldiers should have the option of raising “conscientious objector” status to avoid violating Islamic tenets forbidding the killing of other Muslims. *Id.* at 50; see also Scott Shane & James Dao, *Tangle of Clues About Suspect At Fort Hood*, N.Y. TIMES, Nov. 15, 2009, at A1, available at 2009 WLNR 22970693 (providing additional details regarding Hasan’s June 2007 presentation). Hasan had himself attempted to leave the Army, but was counseled by an attorney that it was highly unlikely he would be released from service. Dao, *supra*. Sometime shortly before he opened fire at Fort Hood, Hasan had learned that he was to be deployed to Afghanistan. *Suspect Was to Deploy to Afghanistan*, ARMYTIMES.COM, Nov. 6, 2009, [http://www.armytimes.com/news/2009/11/army\\_shooting\\_hood\\_110509/](http://www.armytimes.com/news/2009/11/army_shooting_hood_110509/).

<sup>8</sup> See James C. McKinley Jr., *Major Held in Fort Hood Rampage is Charged with 13 Counts of Murder*, N.Y. TIMES, Nov. 13, 2009, at A14, available at 2009 WLNR 22778649; Justin Blum, *Hasan Called War on Terror an Attack on Islam, Classmate Says*, BLOOMBERG, Nov. 7, 2009, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a0OrWS8lBtNg>; see also MARC SAGEMAN, *LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY* 80–81 (2008) (concluding that one of the root causes of Islamist terrorism is the moral outrage that young Muslims around the world feel in response to a perceived “war against Islam”).

<sup>9</sup> See discussion *infra* Part II.B; Anwar al-Awlaki: “Nidal Hassan Did the Right Thing,” NEFA FOUND., Nov. 9, 2009, <http://www.nefafoundation.org/miscellaneous/FeaturedDocs/nefaawlakiforthoodshooting.pdf>; Profile: Anwar al-Awlaki, ANTI-DEFAMATION LEAGUE, Nov. 24, 2009, [http://www.adl.org/main\\_Terrorism/anwar\\_al-awlaki.htm?Multi\\_page\\_sections=sHeading\\_1](http://www.adl.org/main_Terrorism/anwar_al-awlaki.htm?Multi_page_sections=sHeading_1).

<sup>10</sup> Martin Merzer & Ron Hutcheson, *Bush to Allies: It’s Time to Act, Terrorists Seek Nuclear Weapons, He Warns*, PHIL. INQUIRER, Nov. 7, 2001, at A1, available at 2001 WLNR 2408483. President Bush utilized the “with us or against us” refrain multiple times after the 9/11 attacks. See, e.g., GEORGE W. BUSH, *Presidential Address to a Joint Session of Congress*, Sept. 23, 2001, in “WE WILL PREVAIL”: PRESIDENT GEORGE W. BUSH ON WAR, TERRORISM, AND FREEDOM 11, 15 (Nat’l Review ed., 2003) (“Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.”).

¶5

Exacerbating the tensions between the United States and the Muslim world, in the first few months of the “war against terror,” the United States Central Intelligence Agency (CIA) began to employ harsh physical and psychological interrogation methods, such as waterboarding, to obtain information from terrorism suspects who had been captured in Afghanistan.<sup>11</sup> This, despite the fact that U.S. courts have considered the practice of waterboarding a form of torture since at least 1902.<sup>12</sup> Prior to the CIA takeover of U.S. detention facilities abroad, the Federal Bureau of Investigation (FBI) had engaged in a successful program of rapport building—a system in which suspects were treated well and gradually built a relationship with their interrogators.<sup>13</sup> The interrogation procedures the FBI utilized were ones that yielded reliable information and that conformed to the rule of law.<sup>14</sup> Vice President Dick Cheney and other administration officials justified the departure from lawful interrogation practices as the only way to get “life-saving” information.<sup>15</sup>

¶6

An unintended consequence of the Bush administration’s decision to pursue a “war against terror” and “enhanced” interrogation techniques was an alarming up-tick in global al-Qaeda recruitment and the planting of the seeds of a homegrown domestic terrorist problem.<sup>16</sup> To be clear, Nidal Hasan was not involved in a terrorist plot,<sup>17</sup> but his apparent motives for opening fire on a U.S. military base are an indication of a serious and mounting threat to U.S. national security. The Bush administration’s declaration of a war against terror and public revelations of the U.S. torture program vividly illustrated by

<sup>11</sup> The Office of Legal Counsel (OLC) had authorized waterboarding as early as March 2002. See Brian Ross & Richard Esposito, *CIA’s Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, <http://abcnews.go.com/Blotter/Investigation/story?id=1322866>; see also R. Jeffrey Smith & Peter Finn, ‘Torture’ Trail Dates to 2002 Timeline Details Approval of Harsh Interrogation, FT. WAYNE J. GAZETTE, Apr. 23, 2009, at 3A, available at 2009 WLNR 8021941 (dating approval for waterboarding and other harsh interrogation measures to summer 2002).

<sup>12</sup> In 1902, Major Edward F. Glenn was court-martialed for using the “water cure” on Filipino leaders during the Philippine-American War. DONALD A. WELLS, *THE UNITED NATIONS: STATES VS. INTERNATIONAL LAWS* 104 (2005); *Major Glenn Again Accused*, N.Y. TIMES, Dec. 3, 1902, available at <http://query.nytimes.com/mem/archive-free/pdf?res=9505E4D81E3DEE32A25750C0A9649D946397D6CF>. See generally Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT’L L. 468 (2007) (providing a history of U.S. torture prosecutions for interrogations using artificial drowning (i.e., waterboarding) methods).

<sup>13</sup> See ALFRED W. MCCOY, *A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR* 203 (2006).

<sup>14</sup> See *id.*; *Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What did the FBI Know About Them?: Before the H. Comm. on the Judiciary*, 110th Cong. (2008) (statement of John Cloonan, Retired FBI Special Agent), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=3399&wit\\_id=7228](http://judiciary.senate.gov/hearings/testimony.cfm?id=3399&wit_id=7228).

<sup>15</sup> See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 319 (2008); Rich Lowry, *Yes, Harsh Interrogations Work*, NAT’L REV. ONLINE, Sept. 1, 2009, <http://article.nationalreview.com/404820/yes-harsh-interrogations-work/rich-lowry>.

<sup>16</sup> *Why Bush’s ‘Enhanced Interrogation’ Program Failed*, THINK PROGRESS, <http://thinkprogress.org/wp-content/uploads/2009/05/enhanced-interrogation-failed2.pdf>.

<sup>17</sup> Military prosecutors have charged him with thirteen counts of murder in the military justice system. Liz Robbins & Scott Shane, *Army Psychiatrist Will Be Confined Until Trial, Judge Says*, N.Y. TIMES, Nov. 22, 2009, at A37, available at 2009 WLNR 23542267. Major Hasan will be tried in a military court-martial. *Id.* As of June 14, 2010, Major Hasan’s court-martial has been delayed until October 4, 2010. *Judge Delays Hasan Trial*, ARMY TIMES, June 14, 2010, available at 2010 WLNR 15178035.

photographs from Abu Ghraib prison have contributed to a growing global consensus that the United States is fighting a war against the rest of the world.<sup>18</sup> Hasan and other Muslims across the globe have experienced this phenomenon as personal to them, both actually and by association.<sup>19</sup> Meanwhile, contemporary judges and legal scholars in the United States have supported the view that race-based suspicionless interrogation is justifiable as a national security measure.<sup>20</sup>

Torture by government (even on non-citizens) represents a breach of social and legal norms that injures not only individuals, but society as a whole. Torture, almost by definition, requires the dehumanization of all parties involved.<sup>21</sup> When a person is tortured, he is robbed of his very humanity. As Professors J. Jeremy Wisniewski and R.D. Emerick assert: “The very thing that constitutes us—the fact that we are agents capable of exercising our autonomy in the world—is what we are deprived of when we are subjected to torture.”<sup>22</sup> A torture victim’s psychic and physical associations with the social world around him are disrupted by the abuse and, once broken, those bonds are nearly irreparable.<sup>23</sup> Nor does the torturer escape from the experience unharmed. To be successful at his task, the agent of torture has been desensitized to violence and cruelty.<sup>24</sup>

<sup>18</sup> Peter Baker, *Obama’s War Over Terror*, N.Y. TIMES MAG., Jan. 17, 2010, available at 2010 WLNR 1009524 (noting a prevailing global perception that the United States is at war with the rest of the world); *The Abu Ghraib Pictures*, THE NEW YORKER, [http://www.newyorker.com/archive/2004/05/03/slideshow\\_040503#slide=1](http://www.newyorker.com/archive/2004/05/03/slideshow_040503#slide=1); see also text accompanying note 112.

<sup>19</sup> Cf. Tom Tyler, Stephen J. Schulhofer & Aziz R. Huq, *Legitimacy and Deterrence Effects in Counter-Terrorism Policing: A Study of Muslim Americans* 17–18 (Law Sch. at U. of Chi., Paper No. 296 & N.Y.U. Sch. of Law, Paper No. 10–15), available at <http://ssrn.com/abstract=1559923> (last visited Mar. 16, 2010) (finding that one factor that affected the Muslim American community’s reported willingness to cooperate in counter-terrorism police measures was “perceived social discrimination due to ethnicity or religion”).

President Barack Obama has taken some high-profile actions to correct this impression. While on the campaign trail in 2007, Obama emphatically declared: “America is at war with terrorists who killed on our soil; we are not at war with Islam.” Baker, *supra* note 18. President Obama repeated this claim during his April 2009 visit to Turkey, telling the Turkish Parliament that the United States “is not and never will be at war with Islam.” Helene Cooper, *America Seeks Bonds to Islam, Obama Insists*, N.Y. TIMES, Apr. 7, 2009, at A1, available at 2009 WLNR 6479567.

<sup>20</sup> See discussion *infra* Part II.C.

<sup>21</sup> See 18 U.S.C. § 2340 (2004) (federal torture statute); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. I, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85. Professor Teresa Godwin Phelps posits that storytelling is an essential human act and the act of telling one’s story of trauma or abuse can aid in an individual’s transformation from victim into survivor. TERESA GODWIN PHELPS, *SHATTERED VOICES: LANGUAGE, VIOLENCE, AND THE WORK OF TRUTH COMMISSIONS* 56–61 (Bert B. Lockwood Jr. ed., 2004).

<sup>22</sup> J. JEREMY WISNEWSKI & R.D. EMERICK, *THE ETHICS OF TORTURE* 63 (2009).

<sup>23</sup> *Id.* at 59 (disputing the myth that torture has no lasting effects).

<sup>24</sup> Herbert C. Kelman, *The Policy Context of Torture: A Social-Psychological Analysis*, 87 INT’L REV. RED CROSS 123, 130 (2005). In a chapter, entitled *Abu Ghraib’s Abuses and Tortures: Understanding and Personalizing Its Horrors*, Philip Zimbardo, a social psychologist, chronicles the story of Sergeant Ivan “Chip” Frederick II, one of the U.S. Army Reserve Military Police guards prosecuted for abusing prisoners at Abu Ghraib. PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 324–79 (2007). As an expert witness at his court-martial, Zimbardo asserted that broader systemic and situational forces negatively impacted Frederick’s ability to make independent or dispositional choices about his behavior while on duty. *Id.* at 372–73. Prior to his service at Abu Ghraib, Frederick was in all respects a model soldier. *Id.* at 344. The situational forces that influenced Sergeant Frederick to behave in, what Zimbardo characterizes as, “evil” ways included a culture of abuse that permeated the prison

The torturer must adopt the fiction that his victim has ceased to be worthy of humane treatment and dignity.<sup>25</sup> This fantasy wreaks havoc on basic epistemological notions of humanity shared by people as social beings.<sup>26</sup> As former United Nations Secretary-General Kofi Annan has observed, “Torture is an atrocious violation of human dignity. It dehumanizes both the victim and the perpetrator.”<sup>27</sup> Therefore, both the tortured and the torturers require some repair, some healing, some renewal of their humanity. Furthermore, the U.S. public has also been adversely impacted by the government’s torture policies. As targets of the terrorist attacks on September 11, 2001, as witnesses of the photos of detainee abuse at Abu Ghraib, as readers of the series of Office of Legal Counsel (OLC) memos (collectively, the Torture Memos) authorizing torturous interrogation methods, the U.S. body politic is also in need of repair and healing. The aim of the redress project I propose in this Article, then, is to seek out ways to publicly repair those social harms.

¶8

This Article posits that the post-9/11 torture program has—in addition to individual and corporeal wounds—created social wounds. Radiating beyond the particular injuries suffered by individual victims of torture is a broader social trauma. The violation of domestic and international laws prohibiting torture represents a breach of social and legal norms that has injured society as a whole. Other scholars have described the special dangers associated with injuries wrought by widespread, systematic human rights abuses. For one, when government is responsible for transgressing its own laws, it is deeply unsettling because it demonstrates government’s potential to deviate from the established social order again in the future. In addition, violent abuses such as torture tend to create and perpetuate a continuing cycle of vengeance and retribution.<sup>28</sup> The project of social healing, then, is to break that cycle and find ways to publicly repair social harms.

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complex. See *id.* at 288–91 (describing his theory of “the banality of evil”). Zimbardo reports that, as a prisoner at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, Frederick is now “battered and nearly broken.” *Id.* at 375.

<sup>25</sup> Herbert C. Kelman, *Violence without Moral Restraint: Reflections on the Dehumanization of Victims and Victimiziers*, 29 J. SOC. ISSUES 25, 48–52 (1973).

<sup>26</sup> *Id.*

<sup>27</sup> Press Release, U.N. Secretary-General, Freedom from Torture ‘Fundamental Human Right’, Says Secretary-General, U.N. Press Release SG/SM/7855, OBV/223 (June 25, 2001), <http://www.un.org/News/Press/docs/2001/sgsm7855.doc.htm>. The notion that perpetrators of violent human rights abuses have spiritual and psychological injuries that need to be repaired resonates deeply in the Catholic faith. See Daniel Philpott, *After Intractable Moral Disagreement: The Catholic Roots of an Ethic of Political Reconciliation*, in INTRACTABLE DISPUTES ABOUT THE NATURAL LAW: ALASDAIR MACINTYRE AND CRITICS 167, 176 (Lawrence S. Cunningham ed., 2009).

<sup>28</sup> See Nancy L. Rosenbaum, *Introduction: Memory, Law, and Repair*, in BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR 1, 1–2 (Nancy L. Rosenbaum ed., 2002). Rosenbaum and Minow call this danger the “cycle of hatred.” *Id.* The “cycle of hatred” is rooted in the human desire for vengeance. *Id.* The cycle is easily perpetuated when the wronged parties have no official forum to air their grievances or to hold the proper parties accountable. *Id.* at 3. “Perpetrators become victims; victims avengers. The cycle extends across generations.” *Id.* For Minow, the law is the preferred mechanism for social healing. Martha Minow, *Breaking the Cycles of Hatred*, in BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR, *supra*, at 14, 15–16 (acknowledging, however, that “[l]egal responses are no more adequate than any others. But inaction is worse”).



¶9 Professor Eric K. Yamamoto, a leader in redress scholarship, has observed that social healing is a multidisciplinary concept.<sup>29</sup> Efforts at social healing can be grounded in religion, traditional cultural practices, social psychology, peace studies, and even the law.<sup>30</sup> And while courtrooms have long hosted historical and contemporary efforts to obtain reparations for group-based wrongs, this Article proposes the creation of a non-judicial forum—a truth commission—as one method of redressing the social wounds inflicted by the post-9/11 torture program.

¶10 Healing social wounds is achieved by focusing on repairing relationships between victims, offenders, and members of the surrounding community. In the past, truth commissions have encouraged participants to give voice to their experiences as perpetrators of horrible abuses.<sup>31</sup> South Africa's Truth and Reconciliation Commission offered amnesty from criminal prosecution as inducement for these testimonies.<sup>32</sup> This reconciliation model closely resembles the confession and forgiveness model characteristic of Judeo-Christian theological practice.<sup>33</sup> Where the social conflict here—the post-9/11 torture program—involves an attempt to heal relationships involving a large Muslim constituency, an important question that deserves more attention than can be given full consideration in this Article is whether the Judeo-Christian model of reconciliation has anything to offer Muslim participants.<sup>34</sup> In brief, however, there are reasons to be optimistic about this truth project.

¶11 Islam, like other religious traditions, has a theological commitment to promoting peace both within and outside the Muslim community.<sup>35</sup> Although it contains many diverse traditions, Islam maintains a common language and practices for promoting peace.<sup>36</sup> Repentance, forgiveness, and reconciliation are among the principles that resound in Qur'anic discourse.<sup>37</sup> Notions of social healing and reconciliation are not, then, incompatible with Islam, and a truth project like the one described in the subsequent pages<sup>38</sup> has the potential to resonate with Muslim participants.<sup>39</sup>

<sup>29</sup> ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 153, 153–71 (1999).

<sup>30</sup> *Id.*

<sup>31</sup> Minow, *supra* note 28, at 24–25.

<sup>32</sup> *Id.* at 24 (describing South Africa's Truth and Reconciliation Commission).

<sup>33</sup> See L. GREGORY JONES, *EMBODYING FORGIVENESS: A THEOLOGICAL ANALYSIS* 16–18 (1995).

<sup>34</sup> Commentators have debated the utility of using a universal discourse to communicate and adjudicate notions of morality and justice. Some have concluded that theories of justice originating in different philosophical systems are incompatible. See, e.g., *INTRACTABLE DISPUTES ABOUT THE NATURAL LAW: ALASDAIR MACINTYRE AND CRITICS*, *supra* note 27 (containing essays responding to MacIntyre's conclusion regarding the incommensurability of different philosophical traditions). Others have searched for and found theological bases for understanding and adopting a universalist secular human rights theory. See ABDULAZIZ SACHEDINA, *ISLAM AND THE CHALLENGE OF HUMAN RIGHTS* 41–44 (2009) (considering the compatibility of Islamic ethics and liberal human rights philosophy).

<sup>35</sup> See generally Mohammed Abu-Nimer, *A Framework for Nonviolence and Peacebuilding in Islam*, 15 J.L. & RELIGION 217 (2000–01).

<sup>36</sup> See generally *id.*; TSJEARD BOUTA, S. AYSE KADAYIFCI-ORELLANA & MOHAMMED ABU-NIMER, *FAITH-BASED PEACE-BUILDING: MAPPING AND ANALYSIS OF CHRISTIAN, MUSLIM, AND MULTI-FAITH ACTORS* (2005), available at <http://www.salaminstitute.org/FaithBasedActors.pdf> (highlighting the constructive role of faith-based actors by analyzing Muslim and Christian actors' activities and contributions to peace-making).

<sup>37</sup> BOUTA, KADAYIFCI-ORELLANA & ABU-NIMER, *supra* note 36, at 11–12.

<sup>38</sup> See discussion *infra* Part IV.

¶12 Existing laws provide for several avenues of redress for torture victims, including criminal prosecution and civil litigation against individual perpetrators. In this Article, however, I focus on reparations alternatives that would take place outside the courtroom, and specifically, the option of establishing a truth commission as a means of holding government institutions as well as individuals accountable. I proceed in this Article by first identifying and describing the exclusivist narrative structure that has heretofore dominated the discourse.

¶13 Using the discourse of narratives, Part II of this Article presents a central theme of the al-Qaeda recruitment narrative—al-Wala wal-Bara, or loyalty and separation. In al-Qaeda cosmology, the world is divided into two categories—friends and enemies. Salvation for Muslims, the story goes, depends on submission to the religious duty to ally in armed struggle with the Muslim community against all outsiders. Al-Qaeda’s recruitment narrative posits an exclusive and exclusionary worldview that has been reinforced by two key U.S. responses to the 9/11 attacks. By (1) electing to pursue a “war against terrorism” and (2) executing an interrogation program that included torture of terrorist suspects, the United States has unwittingly provided additional support for al-Qaeda’s claim that the United States is at war with all Muslims.

¶14 As one means of countering the exclusive ideologies promoted by al-Qaeda and the United States under the Bush administration, I propose that Congress establish a Truth About Torture Commission (TATC) in the restorative justice model of truth and reconciliation commissions (TRCs) that have been utilized with some success at both the international and U.S. domestic levels.

¶15 In Part III, I situate my proposal for the TATC within the larger efforts of redress and reparations advocates in the United States. First, Part III outlines the various manifestations that reparative efforts have taken in the past in this country. Then, drawing lessons from the recent truth projects in Tulsa, Oklahoma and Greensboro, North Carolina, Part III ends with my description of an Inclusive Model for Social Healing. The Inclusive Model for Social Healing directly confronts exclusivist terrorist ideology and offers an alternative narrative of inclusion premised upon social healing.

¶16 Part IV furnishes more detail concerning the TATC proposal to provide an initial measure of redress for the post-9/11 torture program. The TATC should be conceived of not as the sole remedy to violations of domestic and international prohibitions against torture, but as part of a package of responses, including criminal prosecution and civil liability. But, because the likelihood of initiating criminal and civil prosecutions against those responsible for conceptualizing and implementing the post-9/11 torture program currently seems low,<sup>40</sup> a truth commission would be an important breakthrough step, creating possibilities for other legislative and judicial forms of redress and repair.

¶17 Part IV claims that a truth commission will provide an opportunity for social healing, critical in and of itself. A forum where individuals who have been harmed by torture can tell their stories and may also promote other goals, including a reinvigoration

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<sup>39</sup> To reach that potential, the truth commission must have support from within the affected communities. The next phase of the project that I begin in this Article is to build grassroots support for the Truth About Torture Commission. The inclusive narrative strategy that I describe in this Article has at least one forebear in the work that Redress, an international organization based in London, England, has done with torture survivors. See VÉRONIQUE ROLLAND, TORTURE: STORIES OF SURVIVAL (2005), available at <http://www.redress.org/downloads/publications/survivors.pdf>.

<sup>40</sup> See discussion *infra* Part II.C.

of the U.S. narrative of democracy and human rights. My analysis in Part IV is limited by an intentional decision not to provide a critique of these narrative tropes. Rather, my analysis accepts those ideals at face value, quixotic though they may be. Part IV also identifies and briefly addresses criticisms that could be lodged against the TATC proposal.

¶18 Finally, I conclude that by itself, a transitional justice-style truth commission would not provide adequate relief for the individuals and communities adversely affected by the post-9/11 U.S. torture program. In combination with other reparative acts, such as criminal prosecutions, removal of offenders from public office, and financial compensation, however, a truth commission charged with revealing the truths behind the disintegration of longstanding prohibitions against torture and with creating a public record of those abuses has the potential to accomplish social healing and a reinvigoration of the ideal, inclusive U.S. narrative of democracy and rule of law as a means to challenge Islamic extremist ideology.

## II. FRAMING THE “NARRATIVE PROBLEM”

¶19 The idea of a narrative counter-terrorism strategy is not new, but the subject does not appear to have been studied much yet by lawyers.<sup>41</sup> In this Article, I consider the use of legal mechanisms to advance this narrative counter-terrorism tactic. By using a truth commission as one part of a comprehensive program to provide redress to individuals and reconciliation to communities affected by torture, I argue, the United States would be actively reasserting itself as an open, pluralistic society that values the rule of law; one that presents a true alternative to the hateful, destructive vision of extremists.

¶20 A one-dimensional military approach, by contrast, is not a viable option. If framed solely as a “war against terrorism” the U.S. struggle against Islamist terrorists (or all ideological adversaries, for that matter) will fail. Military strategists have argued for years that to succeed against Islamic extremists, the United States needs to make gains on the ideological battlefield.<sup>42</sup> One tactic for winning over hearts and minds that the United States has not yet effectively exploited is to construct an effective narrative that challenges the one that al-Qaeda promotes. By inviting broad participation in a truth

<sup>41</sup> But see, e.g., William D. Casebeer, *Identity, Culture and Stories: Empathy and the War on Terrorism*, 9 MINN. J.L. SCI. & TECH. 653, 653 (2008) (“[A] failure . . . to come to grips with the narrative dimensions of the war on terrorism, and with the larger concept of culture of which it is a part, is a weakness already exploited by groups such as Al Qaeda.”).

<sup>42</sup> In an effort to win over the local populations in Iraq and Afghanistan, the U.S. Army’s Foreign Military Studies Office (FMSO) created a program called Human Terrain System (HTS). Jacob Kipp, Lester Grau, Karl Prinslow & Don Smith, *The Human Terrain System: A CORDS for the 21st Century*, 9/1/06 MIL. REV. 8, 8–9 (Sept.–Oct. 2006), available at 2006 WLNR 19698765. Dr. Jacob Kipp of the FMSO observes that successes in Iraq and Afghanistan “closely correlate with proactive efforts by coalition units to understand and respect the culture.” *Id.* at 11; see also THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1, 6 (2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/index.html> (“We will also wage a war of ideas to win the battle against international terrorism.”); THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 375–77 (2004) [hereinafter 9/11 COMMISSION REPORT], available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf> (recommending that the United States fully engage in the struggle of ideas, promoting democracy in the face of extremism).

commission, the United States would be engaging in a radical reframing of its ideological approach to al-Qaeda and similar groups.

¶21 Military might is a one-dimensional approach to a multi-dimensional problem.<sup>43</sup> This Part focuses on the role of narratives as an additional aspect of the struggle against Islamist terrorists. First, however, this Part describes what a “narrative” is and explains why understanding the significance of narratives is critical for a counter-terrorism strategy.

### A. *The Narrative Framework*

¶22 A narrative is a story that describes or explains a series of events, people, and ideas. Narratives are the products of a complex interaction between ideas, images, and meanings, and are inextricably linked to their historical and cultural context.<sup>44</sup> Narratology, or the study of narratives, tells us that narratives are embedded in our way of experiencing and understanding the world; so much so that they are routinely accepted and transmitted without any critical inquiry.<sup>45</sup> Narratives can have a profound impact on their audience’s worldview, so understanding how and in what form values and ideologies are communicated is too important to go unexamined.<sup>46</sup>

¶23 Take, for example, a popular narrative of the Civil Rights Movement in the United States: Rosa Parks was tired at the end of a long day at work, and that is why she refused the bus driver’s instruction to comply with Jim Crow segregation laws to move to the back of the bus.<sup>47</sup> This is a simple story that communicates a basic message: by remaining in her seat, Rosa Parks was a civil rights pioneer. However, it is also dangerous in its simplicity. This story obscures the truth that the Montgomery Bus Boycott was a small part of a larger, extremely organized political movement that had its origins as far back as *Plessy v. Ferguson*, the United States Supreme Court case that enshrined the separate but equal doctrine.<sup>48</sup> Homer Plessy was enlisted to test

<sup>43</sup> Cf. 9/11 COMMISSION REPORT, *supra* note 42, at 363 (“Calling this struggle a war accurately describes the use of American and allied armed forces to find and destroy terrorist groups and their allies in the field, notably in Afghanistan. The language of war also evokes the mobilization for a national effort. Yet the strategy should be balanced.”).

<sup>44</sup> See, e.g., Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 266–68 (2009).

<sup>45</sup> See, e.g., *id.* at 268 (“Although story-myths can create and expand meaning, they often substitute ‘blissful clarity’ for complexity.”); Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology?*, 18 YALE J.L. & HUMAN. 1, 3 (2006) (“[I]f the ways stories are told, and are judged to be told, makes a difference in the law, why doesn’t the law pay more attention to narratives, to narrative analysis and even narrative theory?”).

<sup>46</sup> See generally Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority* 9 (William S. Boyd Sch. of Law, Research Paper No. 10-02, 2010), available at <http://ssrn.com/author=1128370>.

<sup>47</sup> See ROSA PARKS, ROSA PARKS: MY STORY 116 (1992). In her autobiography, Parks writes:

People always say that I didn’t give up my seat because I was tired, but that isn’t true. I was not tired physically, or no more tired than I usually was at the end of a working day. I was not old, although some people have an image of me as being old then. I was forty-two. No, the only tired I was, was tired of giving in.

*Id.*

<sup>48</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Louisiana's Separate Car Act as a part of a planned act of civil disobedience.<sup>49</sup> His arrest gave Comité des Citoyens (Committee of Citizens), the political organization to which he belonged, the standing necessary to challenge the segregation law in court.<sup>50</sup> Like Homer Plessy before her, Rosa Parks was also selected to play her role in a larger, organized mass protest.<sup>51</sup> The National Association for the Advancement of Colored People (NAACP) had considered, but rejected other African American women to serve as the face of the anti-segregation litigation, including Claudette Colvin and Mary Louise Smith, teenagers who had been arrested for refusing to cede their bus seats to white passengers.<sup>52</sup> Both were passed over in favor of Parks, an employed, married, light-skinned woman, who was considered a more suitable representative for the movement.<sup>53</sup> In Parks, civil rights leaders found a protagonist beyond moral reproach, a critical element to the success of the carefully orchestrated boycott.<sup>54</sup>

¶24 The dominant Rosa Parks narrative confronts little resistance and is easy to understand and accept because of U.S. cultural norms that elevate the notion of the individual and individual achievement over the group and social achievements.<sup>55</sup> The story that tells us Rosa Parks was an outstanding individual who made a heroic personal choice to defy the law and engage in civil disobedience fits the mold of U.S. individualism. The real story has been obscured from popular awareness because the dominant narrative has been told and retold so frequently, thus reifying itself almost beyond critical inquiry.

¶25 The Rosa Parks story is one example of the way that narratives provide a method of communicating information efficiently—by exploiting pre-existing cultural meanings and allowing audiences to use cognitive shortcuts to digest complicated messages quickly.<sup>56</sup> But, in this expediency, oftentimes nuance and critical details are sacrificed for the sake of rapid communication to a mass audience. The narrative form is powerful because most exchanges are transacted without much conscious effort or discussion. I argue here that by studying how the al-Qaeda narrative works, we can become more adept at crafting effective counter-narratives.

<sup>49</sup> KEITH WELDON MEDLEY, *WE AS FREEMEN: PLESSY V. FERGUSON* 13–15 (2003).

<sup>50</sup> *Id.* at 14.

<sup>51</sup> *Id.* at 16; PARKS, *supra* note 47, at 124–25; *see also* Michael P. Seng, *From Rosa Parks to Barack Obama—The Evolution of the Civil Rights Movement*, COMMON L. REV. 1, 3 (Special Supplement Spring 2010) (contextualizing Parks's act of civil disobedience as a part of the larger Civil Rights Movement).

<sup>52</sup> Brooks Barnes, *From Footnote to Fame in Civil Rights History*, N.Y. TIMES, Nov. 26, 2009, at A1, available at 2009 WLNR 23892457. Civil rights leaders considered Claudette Colvin unsuitable to serve as the face of the bus boycott because, in their eyes, she was too “feisty.” *Id.* Colvin became pregnant by a married man shortly after her arrest, and the NAACP eventually chose Parks to be its protagonist in the Montgomery Bus Boycott. *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *See* Dennis Carlson, *Troubling Heroes: Of Rosa Parks, Multicultural Education, and Critical Pedagogy*, 3 CULTURAL STUD. CRITICAL METHODOLOGIES 44, 50–51 (2003), available at <http://csc.sagepub.com/content/3/1/44>.

<sup>55</sup> *See, e.g.*, HERBERT KOHL, *SHE WOULD NOT BE MOVED: HOW WE TELL THE STORY OF ROSA PARKS AND THE MONTGOMERY BUS BOYCOTT* 37–38 (2005).

<sup>56</sup> Berger, *supra* note 44, at 298.

*B. Al-Wala wal-Bara (Loyalty and Separation)*

¶26

Al-Qaeda, like other groups, has constructed a narrative to communicate its purpose in the world.<sup>57</sup> The narrative is relatively simple and straightforward, and it has proven quite successful in energizing its members during times of crisis and attracting new recruits. By casting the contemporary efforts of al-Qaeda to establish a universal caliphate as a continuation of the Prophet Muhammad's conquest of the Arabian Peninsula, the authors of the al-Qaeda story are making a faith-based appeal to potential recruits through a shared cultural and religious history.<sup>58</sup> And although commentators often decry al-Qaeda's version of the story as extremist,<sup>59</sup> it is undeniable that the al-Qaeda narrative is based in the historical traditions of Islam.<sup>60</sup> The al-Qaeda narrative, however, is only a particular iteration of the Islamic faith. Upon close examination, the al-Qaeda narrative reveals itself to be malleable; a story that has been refined over time to accommodate the changing needs of the organization.<sup>61</sup> Nevertheless, three major themes remain constant in the al-Qaeda narrative: (1) Muslims are the victims of Western

<sup>57</sup> For example, the Revolutionaries who pressed for a war of independence against King George III invoked the democratic right of self-governance granted to them under "natural law." Natsu Taylor Saito, *Colonial Presumptions: The War on Terror and the Roots of American Exceptionalism*, 1 GEO. J.L. & MOD. CRITICAL RACE PERSP. 67, 88–92 (2009), available at <http://ssrn.com/abstract=1546023>. According to the narrative of the American Revolution, the colonists were entitled to rebel because the British Crown had become a tyrant. *Id.*

Likewise, the contemporary "tea party" movement is currently crafting its own creation narrative, a delicate task because there is (as of yet) no central leadership for the various tea party groups. Journalist Kate Zernike has chronicled major events in the life of the little-over-a-year-old movement, noting that as the movement grows, it has been careful to adjust its narrative to accommodate the largest possible base. See Kate Zernike, *A Young and Unlikely Activist Who Got to the Tea Party Early*, N.Y. TIMES, Feb. 28, 2010, at A1, available at 2010 WLNR 4356857 (recording the first rally event in the tea party movement, led by an "unlikely" activist—a nose-ring wearing, thirty-year-old actress); Kate Zernike, *Seeking a Big Tent, Tea Party Avoids Divisive Social Issues*, N.Y. TIMES, Mar. 13, 2010, at A1, available at 2010 WLNR 5281528 (quoting tea party leadership decisions to narrow the focus of the movement to promoting conservative fiscal and political issues as opposed to divisive social ones).

<sup>58</sup> Gilles Kepel, *General Introduction: Al Qaeda, the Essentials*, in AL QAEDA IN ITS OWN WORDS 1, 6–7 (Gilles Kepel & Jean-Pierre Milelli eds., Pascale Ghazaleh trans., 2008) (2005); see also 9/11 COMMISSION REPORT, *supra* note 42, at 48 ("Bin Ladin saw himself as called 'to follow in the footsteps of the Messenger and to communicate his message to all nations . . .').

<sup>59</sup> See, e.g., THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF 2006, at 10, available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2006/> ("A proud religion—the religion of Islam—has been twisted and made to serve an evil end, as in other times and places other religions have been similarly abused.").

<sup>60</sup> Kepel, *supra* note 58, at 5–7. Professor Kepel asserts that the al-Qaeda agitprop is replete with quotations from and citations to the Qur'an, hadith, and other religious authorities. *Id.* "In this literature, history is simply the infinite repetition of a single narrative: the arrival of the Prophet, the rise of Islam, the struggles to extend its dominion, and its expansion throughout the world." *Id.* at 6. Bolstering the Islamist agenda with religious doctrine has an explicit purpose—the opportunity to claim "impeccable religious legitimacy." *Id.*

<sup>61</sup> See Casebeer, *supra* note 41, at 658–60 (describing the changing roles that narratives play at each stage in the life cycle of a terrorist organization); SAGEMAN, *supra* note 8, at 37–40. Stéphane Lacroix notes that Ayman al-Zawahiri's initial call for loyalty and separation did not distinguish between Sunni and Shi'a Muslims. Stéphane Lacroix, *Introduction: Ayman al-Zawahiri, Veteran of Jihad*, in AL QAEDA IN ITS OWN WORDS, *supra* note 58, at 147, 167–68. It was only after Iraqi militant Abu Musab al-Zarqawi joined al-Qaeda in October 2004 that al-Zawahiri was forced to relent to al-Zarqawi's virulent anti-Shi'a strain of al-Wala wal-Bara. *Id.* 168–69.

oppression;<sup>62</sup> (2) God will bless martyrs;<sup>63</sup> and, (3) if you are not with us, you are against us—al-Wala wal-Bara, or “loyalty and separation.”<sup>64</sup>

¶27 In this Article, I focus on the last theme described above: if you are not with us, you are against us; if you do not join the struggle, you are aiding the oppressors. Al-Qaeda relies on the Islamic tradition “al-Wala wal-Bara” as the basis for this claim, and has transformed religious doctrine into the radical claim that you are obligated to participate in violent jihad if you are a faithful Muslim; if you do not, you will be excommunicated.<sup>65</sup>

¶28 This particular narrative—loyalty and separation—is successful because it reinforces an existing group ideology, helps maintain group cohesion, and also aids in recruitment efforts. First, al-Wala wal-Bara originates in the Islamic faith and for this reason, the narrative has an intrinsic appeal for the Muslim audience. Islamists have gone so far as to claim that al-Wala wal-Bara is as fundamental to the practice of the faith as the Five Pillars of Islam—profession of the faith, prayers, almsgiving, fasting, and pilgrimage to Mecca.<sup>66</sup> Stéphane Lacroix of the Paris Institute for Political Studies explains, however, that while “loyalty” (wala) and “separation” (bara) are legitimate elements of Islamic doctrine, the combination of the two as a unit was deployed only in modern times for the specific purpose of “galvanizing the troops” in early Saudi Arabia against secular influences.<sup>67</sup>

<sup>62</sup> Osama bin Laden, *Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Sanctuaries (Excerpts)*, reprinted in AL QAEDA IN ITS OWN WORDS, *supra* note 58, at 47, 47 (“Each of you knows the injustice, oppression, and aggression the Muslims are suffering from the Judeo-crusading alliance and its lackeys.”).

<sup>63</sup> Abdallah Azzam, *Join the Caravan (Excerpts)*, reprinted in AL QAEDA IN ITS OWN WORDS, *supra* note 58, at 110, 119 (quoting a hadith that provides “seven special favors by God” for martyrs, including forgiveness of all sins, a reservation in Paradise, marriage to seventy-two beautiful women, and the ability to intercede in prayer on behalf of seventy members of his family).

<sup>64</sup> Osama bin Laden, *Tactical Recommendations (Excerpts)*, reprinted in AL QAEDA IN ITS OWN WORDS, *supra* note 58, at 60, 63–64 (asserting that, after the 9/11 attacks, “[t]he entire world awoke, Muslims realized how important the doctrine of loyalty to God and separation is, and solidarity among Muslims grew stronger, which is a giant step toward the unification of Muslims under the banner of monotheism, in order to establish the rightly guided caliphate” (citation omitted)).

<sup>65</sup> See, e.g., Lacroix, *supra* note 61, at 167–69. The concept of takfir (excommunication), like al-Wala wal-Bara, is another doctrinal means of drawing bright lines between friends and enemies for Islamists. For Islamists, those Muslims who refuse to participate in jihad are takfir, or non-Muslims. LAWRENCE WRIGHT, *THE LOOMING TOWER: AL QAEDA AND THE ROAD TO 9/11*, at 34, 142–43 (2007); see also JUAN COLE, *ENGAGING THE MUSLIM WORLD* 59 (2009) (noting that takfiri ideology directly contradicts the Qur’an, which prohibits Muslims from declaring the apostasy of other Muslims).

<sup>66</sup> See Ayman al-Zawahiri, *Loyalty and Separation: Changing an Article of Faith and Losing Sight of Reality (Excerpts)*, reprinted in AL QAEDA IN ITS OWN WORDS, *supra* note 58, at 206, 209 [hereinafter Al-Zawahiri, *Excerpts*] (“That is why we consider the greatest sedition in our time that threatens monotheism and the faith is to abandon the alliance of Muslims and hostility toward nonbelievers.”); Ayman al-Zawahiri, *Loyalty and Enmity: An Inherited Doctrine and a Lost Reality*, reprinted in THE AL QAEDA READER 66, 66–67 (Raymond Ibrahim ed. & trans., 2007) [hereinafter Al-Zawahiri, *Loyalty and Separation*] (“Due to the events of this war and its realities, there is an urgent need to comprehend the doctrine of Loyalty and [Separation] in Islam. Negligence and indolence have spread in regard to upholding this great pillar of Islamic faith.”). Ibrahim translates the title of this treatise as “Loyalty and Enmity,” but for consistency’s sake, I will refer to his translation as “Loyalty and Separation.”

<sup>67</sup> Lacroix, *supra* note 61, at 167.

¶29 Nonetheless, this element of the al-Qaeda narrative is very effective at promoting group cohesion. As an organizational tool, al-Wala wal-Bara is extremely efficient as it allows for rapid compartmentalization of individuals and groups into “friend” and “enemy” categories. According to the al-Qaeda narrative, non-Muslims are categorically enemies and even other Muslims can be enemies.<sup>68</sup> Muslim enemies include Shi’a Muslims<sup>69</sup> and the political leaders of secular governments in the Muslim world.<sup>70</sup>

¶30 Third, al-Wala wal-Bara acts as a recruiting tool by exploiting discontent among vulnerable Muslim groups, particularly the youth. As the Washington Institute for Near East Policy concluded in its March 2009 report: “Instrumental to [al-Qaeda’s] success is the group’s ability to connect an individuals’ local grievances to the global narrative.”<sup>71</sup> In his 2008 study of terrorist networks, psychiatrist Marc Sageman notes that social conditions such as isolation, discrimination, and marginalization experienced by Muslim youth can become a perfect storm leading to radicalization if those same youth become mobilized by narrative messages spread through terrorist networks, often over the Internet.<sup>72</sup> In a world where young Muslims often feel like outcasts—like the perpetual “them”—they are particularly susceptible to exhortations to join a group that could make them feel like an “us.” The al-Qaeda narrative insists upon an exclusive “us versus them” framing of the world that exacts a weighty price for electing to remain outside of the group—isolation versus belonging; certain excommunication versus an opportunity to become a hero within the community.<sup>73</sup>

¶31 The “us against them” narrative trope is woven throughout the al-Qaeda literature, and the biography of al-Qaeda’s founder is emblematic. Osama bin Laden first became affiliated with the global jihadist movement while he was a university student in the 1970s.<sup>74</sup> As a young man, Bin Laden was exposed to the writings of Sayyid Qutb, a leader in the Egyptian Muslim Brotherhood movement.<sup>75</sup> By his death in 1966, Qutb had developed an intellectual and theological foundation for violent jihad that the next generation of Islamists, like Sayyed Imam al-Sharif (also known as Dr. Fadl), would later draw upon and augment. Dr. Fadl’s books, *The Essential Guide for Preparation* and *The*

<sup>68</sup> In justifying the branding of some Muslims as enemies of al-Qaeda, Bin Laden explained: “The terrorism we practice is of the commendable kind for it is directed at . . . the enemies of Allah, the tyrants, the traitors who commit acts of treason against their own countries and their own faith and their own prophet and their own nation.” Interview by John Miller, ABC Reporter, with Osama bin Laden, in Afghanistan (May 28, 1998), available at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html>. For Bin Laden, Muslims who have become “traitors” to their faith and their prophet are legitimate targets of his enmity. *Id.*

<sup>69</sup> Lacroix, *supra* note 61 at 168–69 (using the al-Wala wal-Bara doctrine to justify violence against Shi’a Muslims).

<sup>70</sup> Al-Zawahiri, *Loyalty and Separation*, *supra* note 66, at 101–04.

<sup>71</sup> TASK FORCE ON CONFRONTING THE IDEOLOGY OF RADICAL EXTREMISM, THE WASH. INST. FOR NEAR E. POLICY, *REWRITING THE NARRATIVE: AN INTEGRATED STRATEGY FOR COUNTERRADICALIZATION* 4 (2009) [hereinafter *REWRITING THE NARRATIVE*].

<sup>72</sup> SAGEMAN, *supra* note 8, at 84–88.

<sup>73</sup> *Id.* at 80–82 (“Jihadi websites celebrate the nobility of the sacrifice of their heroes. For instance, the 9/11 perpetrators are usually referred to as ‘the magnificent 19 who did holy Tuesday.’”).

<sup>74</sup> Omar Saghi, *Introduction: Osama bin Laden, The Iconic Orator*, in *AL QAEDA IN ITS OWN WORDS*, *supra* note 58, at 11, 15–16.

<sup>75</sup> *Id.*; see also 9/11 COMMISSION REPORT, *supra* note 42, at 51. Sayyid Qutb is the “forefather of Islamist terrorism.” SAGEMAN, *supra* note 8, at 37; see also COLE, *supra* note 63, at 57–62 (describing Qutb’s politics of exclusion, including the practice of takfir or “faith denial”).



*Compendium of the Pursuit of Divine Knowledge* would later provide the theoretical bases for al-Qaeda's terrorist operations.<sup>76</sup> In these texts, Dr. Fadl promoted Qutb's earlier message that all pious Muslims should mount an armed struggle against non-Muslim states in order to establish a worldwide caliphate that would be governed by Shari'a, or Islamic law.<sup>77</sup> Dr. Fadl argued that in this jihad, killing civilians and non-Muslims was justified. He further argued that Muslims who did not enroll in the struggle would be excluded from salvation.<sup>78</sup>

¶32 The rhetoric of inclusion and exclusion resonated deeply with the young Bin Laden. His experience as an Islamist militant had begun in earnest in Afghanistan around 1980, during the Soviet occupation of that country.<sup>79</sup> Like other young Muslims during that era, the Saudi-born Bin Laden felt compelled by a sense of religious loyalty to join the military campaign of Afghan Muslims against the Soviet invaders.<sup>80</sup> Bin Laden enthusiastically responded to the call, ingratiating himself with the Afghan mujahedeen by funneling money and other resources from his wealthy connections in Saudi Arabia.<sup>81</sup> Bin Laden emerged from this period as a well-known leader in the radical Islamist movement, and his experiences in Afghanistan would soon lay the groundwork for the formation of al-Qaeda.<sup>82</sup>

¶33 Under the influence of Ayman al-Zawahiri, Bin Laden's lieutenant and the co-founder of al-Qaeda, the notion of al-Wala wal-Bara gained new currency and has now become a central tenet in the Islamist's theory of jihad.<sup>83</sup> Al-Zawahiri published his jihadist treatise, *Loyalty and Separation*, in 2002.<sup>84</sup> In it, citing as authority numerous verses of the Qur'an and excerpts from the hadith, he concludes: "Allying with believers and confronting the unbelievers are essential pillars of the Muslim faith, without which this faith remains incomplete."<sup>85</sup> The contemporary call for loyalty and separation made by al-Qaeda's intellectuals has struck a chord with Islamist militants. As a Yemeni member of al-Qaeda recently proclaimed: "The issue is between us and America and its allies, and beware, those who stand in the ranks of America."<sup>86</sup>

<sup>76</sup> See REWRITING THE NARRATIVE, *supra* note 71, at 3. It is important to note that Dr. Fadl has recently called on al-Qaeda and other Islamist groups to end their violent campaigns, declaring that acts of terrorism violate Islamic law. Lawrence Wright, *The Rebellion Within: An Al Qaeda Mastermind Questions Terrorism*, NEW YORKER, June 2, 2008, available at [http://www.newyorker.com/reporting/2008/06/02/080602fa\\_fact\\_wright](http://www.newyorker.com/reporting/2008/06/02/080602fa_fact_wright).

<sup>77</sup> *Id.*

<sup>78</sup> "Fadl defines Islam so narrowly, however, that nearly everyone falls outside the sacred boundaries. Muslims who follow his thinking believe that they have a divine right to kill anyone who disagrees with their straitened view of what constitutes a Muslim." *Id.*

<sup>79</sup> Saghi, *supra* note 74, at 15–17 (noting that bin Laden's first involvement with Islamist militancy was in 1979 when he provided financial assistance to the Syrian Muslim Brothers' attempt to overthrow President Hafez al-Assad).

<sup>80</sup> See *id.*; 9/11 COMMISSION REPORT, *supra* note 42, at 55.

<sup>81</sup> 9/11 COMMISSION REPORT, *supra* note 42, at 55–56.

<sup>82</sup> *Id.* at 56.

<sup>83</sup> Lacroix, *supra* note 61, at 167–68.

<sup>84</sup> Al-Zawahiri, *Loyalty and Separation*, *supra* note 66.

<sup>85</sup> Al-Zawahiri, *Excerpts*, *supra* note 66, at 231; see al-Zawahiri, *Loyalty and Separation*, *supra* note 66, at 66–115.

<sup>86</sup> Eric Lipton, Eric Schmitt & Mark Mazzetti, *Review of Jet Bomb Plot Shows More Missed Clues*, N.Y. TIMES, Jan. 18, 2010, at A1, available at 2010 WLNR 1054855 (quoting a Yemeni member of al-Qaeda).

¶34 The success of al-Qaeda does not depend on the strength and visibility of its leadership, but rather on the vitality of its message. Although Bin Laden's voice and image retain inestimable symbolic meaning for Islamist terrorists, he is not responsible for guiding day-to-day strategy.<sup>87</sup> Even the foundational influence that al-Zawahiri used to wield in the al-Qaeda organization has recently begun to wane.<sup>88</sup> None of this matters, however, because the underlying message of the narrative survives, even thrives, when individual leaders become incapacitated.<sup>89</sup> As the 9/11 Commission<sup>90</sup> warned:

The problem is that al Qaeda represents an ideological movement, not a finite group of people. It initiates and inspires, even if it no longer directs. In this way it has transformed itself into a decentralized force. Bin Ladin may be limited in his ability to organize major attacks from his hideouts. Yet killing or capturing him, while extremely important, would not end terror. His message of inspiration to a new generation of terrorists would continue.<sup>91</sup>

The message of hate, extremism, and violence is propelled by a self-propagating narrative force. Thus, the process of identifying, understanding, and de-constructing the al-Qaeda narrative is critical to any efforts to undermine it.

¶35 Several commentators have discussed the problem of narratives in the “war on terror.” One of the final recommendations of the 9/11 Commission, for example, was “to prevent the continued growth of Islamist terrorism” by engaging the Muslim community worldwide in a dialogue in which the United States clearly defines itself and its core values as fully compatible with Islam.<sup>92</sup> The Commission concluded: “We should offer an example of moral leadership in the world, committed to treat people humanely, abide by the rule of law, and be generous and caring to our neighbors . . . . To Muslim parents, terrorists like Bin Ladin have nothing to offer their children but visions of violence and death.”<sup>93</sup> In other words, the Commission urged U.S. leaders to offer a competing narrative to Muslim youth than the one presently available from Islamic extremists.<sup>94</sup>

¶36 However, the U.S. response to two critical events in the past nine years—the 9/11 attacks and the revelation of torture at Abu Ghraib—has undermined the United States's ability to highlight the democratic values that provide a firewall against the success of

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whose statement aired on al-Jazeera in the days before Umar Farouk Abdulmutallab's failed attempt to detonate a bomb on an international flight bound for the United States).

<sup>87</sup> See SAGEMAN, *supra* note 8, at 126.

<sup>88</sup> Lacroix, *supra* note 61, at 169–70.

<sup>89</sup> See SAGEMAN, *supra* note 8, at 145–46.

<sup>90</sup> The 9/11 Commission was made up of five Democrats and five Republicans, which presented a detailed report and offered recommendations for dealing with and preventing events similar to the September 11, 2001 attacks. 9/11 COMMISSION REPORT, *supra* note 42, at xv–xvii.

<sup>91</sup> THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES: EXECUTIVE SUMMARY 16 (2004), available at [http://www.9-11commission.gov/report/911Report\\_Exec.pdf](http://www.9-11commission.gov/report/911Report_Exec.pdf) [hereinafter 9/11 EXECUTIVE SUMMARY].

<sup>92</sup> 9/11 COMMISSION REPORT, *supra* note 42, at 374–75.

<sup>93</sup> *Id.* at 376.

<sup>94</sup> See discussion *infra* Part II.C.

terrorist narratives.<sup>95</sup> In response to the 9/11 attacks, the United States, led by the Bush administration, declared a war on terrorists and created a program of torture. The United States and al-Qaeda (and its affiliated groups) are fighting an ideological battle as well as a military one. To illustrate this, the next section examines the U.S. narrative response to first, the 9/11 terrorist attacks and second, the Abu Ghraib prison scandal.

### C. War and Torture

¶37 During a September 16, 2001 speech to world leaders, President Bush declared: “This crusade, this war on terrorism, is going to take a while.”<sup>96</sup> However, framing the U.S. response to the 9/11 attacks as an act of war was not the Bush administration’s immediate reaction, nor was it the only narrative option available. Initially, the administration labeled the attacks as criminal.<sup>97</sup> Some administration officials invoked the metaphor of terrorism as a disease.<sup>98</sup> The ultimate decision was to declare a “war on terror,” however, and that decision has had several negative impacts.

¶38 The most significant of these negative effects is that many Muslims experienced (and continue to experience) the war on terror as a war on Islam. Nidal Hasan’s shooting rampage at Fort Hood in November 2009 was simply the most recent and visible manifestation of this sentiment.<sup>99</sup> Radical Islamist leaders have exploited this sensation

<sup>95</sup> In the words of the Washington Institute for Near East Policy report: “Prosperous democratic societies that respect the rights of their citizens are more resilient and less susceptible to political instability and radicalization.” REWRITING THE NARRATIVE, *supra* note 71, at 13; *see also* Tyler, Schulhofer & Huq, *supra* note 19, at 8.

<sup>96</sup> Ken Herman, *U.S. Braces for Long War; Bush Pledges All-Out Crusade ‘to Rid World of Evildoers’*, ATLANTA J.-CONST., Sept. 17, 2001, at A1, *available at* 2001 WLNR 3974920.

<sup>97</sup> George Lakoff & Evan Frisch, *Five Years After 9/11: Drop the War Metaphor*, COMMONDREAMS.ORG, Sept. 11, 2006, <http://www.commondreams.org/views06/0911-20.htm> (reporting that Secretary of State Colin Powell had advocated using a criminal law framework to respond to the 9/11 terrorist attacks).

<sup>98</sup> When he released the State Department’s pre-9/11 report on global terrorism, Secretary Powell called terrorism “a persistent disease.” Transcript of Statement, Sec’y of State Colin Powell Releases Terrorism Report, CNN (Apr. 30, 2001), <http://transcripts.cnn.com/TRANSCRIPTS/0104/30/se.04.html>; Charles Wolfson, ‘A Persistent Disease’: Powell Says International Cooperation is Paying Off, CBS NEWS, May 4, 2001, <http://www.cbsnews.com/stories/2001/05/04/opinion/diplomatic/main289505.shtml>.

<sup>99</sup> In August 2010, a shopkeeper in Baghdad, Iraq was quoted by the New York Times declaring: “America hates Islam.” Thanassis Cambanis, *Looking at Islamic Center Debate, World Sees the U.S.*, N.Y. TIMES, Aug. 26, 2010, at A12, *available at* 2010 WLNR 16986167. The shopkeeper, Mohaimen Jabar, made this observation in response to the protests against the construction of a mosque in Lower Manhattan, two blocks away from Ground Zero where the twin towers of the World Trade Center used to stand. *Id.* A coalition of conservative Republican and Democratic politicians, some of the 9/11 families, and the Anti-Defamation League led the opposition to the building project (Park51), which would be modeled after other faith-based community centers like the Y.M.C.A. *See* Michael Barbaro, *Debate Heats Up About Mosque Near Ground Zero*, N.Y. TIMES, July 31, 2010, at A1, *available at* 2010 WLNR 15225887; Javier C. Hernandez, *Planned Sign of Tolerance Bringing Division Instead*, N.Y. TIMES, July 14, 2010, at A22, *available at* 2010 WLNR 14077837. Many who oppose the construction plans cite the proposed mosque’s proximity to Ground Zero. Hernandez, *supra*. For example, former Republican Vice-Presidential candidate Sarah Palin used her Twitter account to call for Muslims to reject the plan, calling it an “UNNECESSARY provocation.” SarahPalinUSA, <http://twitter.com/sarahpalinusa> (July 18, 2010, 1:57 PM). The controversy surrounding Park 51 illustrates the continuing difficulty that the U.S. public has in distinguishing between the religion of Islam and the terrorists who perpetrated the 9/11 attacks. Mohaimen Jabar’s quote is further proof of the effect that this illogic has had on the Muslim psyche.

for recruiting purposes. Al-Zawahiri capitalized on President Bush's unfortunate choice of the word "crusade" in the opening lines of his jihadist treatise, *Loyalty and Separation*.

This point in Islamic history is witness to a furious struggle between the powers of the infidels, tyrants, and haughtiness, on the one hand, and the Islamic *umma* and its *mujahid* vanguard on the other. This struggle peaked with the blessed raids against New York and Washington [9/11 attacks] and what followed: [U.S. president George W.] Bush's declaration to carry out his new Crusade against Islam, or what he dubbed the "War on Terror."<sup>100</sup>

Al-Zawahiri's extreme reaction to President Bush's word choice may appear unwarranted, but the language and sentiment expressed by President Bush is not uncommon in U.S. public discourse and the cumulative effect of these statements should be considered.

¶39 For example, Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit asserted, in his 2006 book *Not A Suicide Pact*, that focusing counter-terrorism efforts on Muslim Americans solely because they are Muslim is a prudent and pragmatic strategy.<sup>101</sup> The perception that the war against terror is in fact a war against Islam and against Muslims has also been reinforced by the high court. In its 2008 decision in *Ashcroft v. Iqbal*,<sup>102</sup> the Supreme Court lent additional support for discrimination against Muslims and Muslim Americans in the name of national security, reasoning:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group . . . . *It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims . . . .*<sup>103</sup>

¶40 When individuals in Muslim and Muslim American communities perceive that they are suspects rather than partners, it is more difficult to execute counter-terrorism initiatives. If Muslim Americans distrust the government and law enforcement, they are less likely to assist in counter-terrorism investigations.<sup>104</sup> Moreover, the war on terror

<sup>100</sup> Al-Zawahiri, *Loyalty and Separation*, *supra* note 66, at 66.

<sup>101</sup> Judge Richard A. Posner contends that U.S. intelligence agencies "want to maintain a close watch on radical imams in the U.S. Muslim community of several million people" and are therefore justified in surveilling U.S. mosques "even if there is no basis for thinking that any of these imams has yet crossed the line that separates advocacy from incitement." RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 111–12 (2006).

<sup>102</sup> *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2008).

<sup>103</sup> *Id.* at 1951 (emphasis added).

<sup>104</sup> See Tyler, Schulhofer & Huq, *supra* note 19, at 6 (warning that overly intrusive policing measures and a sense that law enforcement is not acting fairly correlate to a lack of community cooperation with government counter-terrorism initiatives).

metaphor reinforces the extremists' version of events.<sup>105</sup> In other words, it is us against them. And in this calculus, Arabs and Muslims will never be a part of the "us" of the United States and its struggle against Islamist terrorists.

¶41 In April 2004, the CBS network show *60 Minutes II* was the first news media outlet to broadcast photographs showing U.S. service members abusing prisoners at Abu Ghraib prison in Iraq.<sup>106</sup> The U.S. response to Abu Ghraib was as problematic as its response to the 9/11 attacks because of the schizophrenic messages contained in it: the United States does not torture, but those who had tortured were dismissed as "a few bad apples."<sup>107</sup> In the aftermath of the scandal, only low-level soldiers were tried and punished.<sup>108</sup>

¶42 The Abu Ghraib photos re-energized al-Qaeda's recruiting efforts because they again confirmed the al-Qaeda narrative. The photos provided visual proof of al-Qaeda's claim that Muslims everywhere are the victims of U.S. oppression; oppression which has taken the form of a war on Islam and the torture of Muslim bodies. Without question, many of the grievances voiced by violent Islamist groups against the United States existed before 9/11.<sup>109</sup> The abusive treatment that Muslim captives suffered at U.S. military prisons like Abu Ghraib and Guantánamo, however, became flash points in the conflict, re-igniting the momentum of Islamist terrorists.

¶43 At Abu Ghraib, soldiers wearing U.S. military garb violated their prisoners in ways specifically calculated to humiliate them as Muslims.<sup>110</sup> Well-known examples of this include forcing prisoners to strip naked, to confront dogs, and to view the bared bodies of female guards.<sup>111</sup> Guantánamo in particular has become an international symbol of the

<sup>105</sup> Al-Qaeda and other Islamist terrorist groups relish the notion of a war against the United States and the West. Radical Islamists frame the current military conflict in Afghanistan as a continuation of the struggle against Soviet occupation of that country in the 1980s. This allows them to claim the bygone glory of triumph against a great occidental power. See 9/11 COMMISSION REPORT, *supra* note 42, at 55–56; Kepel, *supra* note 58, at 6.

<sup>106</sup> James Risen, *The Struggle for Iraq: Treatment of Prisoners; G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15, available at 2004 WLNR 5501121; Rebecca Leung, *Abuse of Iraqi POWs By GIs Probed*, CBSNEWS.COM, Apr. 28, 2004, <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml>; Seymour M. Hersch, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, available at [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact).

<sup>107</sup> See Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 220–22 (2010). The post-9/11 torture program was created, organized, and systematically executed by individuals who were carrying out orders from a higher command, not by rogue soldiers or private security contractors. See MAYER, *supra* note 15, at 170–76 (noting that in February 2008, the Bush Administration publically acknowledged the use of waterboarding on high-value terrorist suspects as an "effective interrogation technique"); PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 4 (2008); Walter J. Kendall III, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals - by Jane Mayer and Torture Team: Rumsfeld's Memo & the Betrayal of American Values - by Philippe Sands*, 34 PEACE & CHANGE 375, 376 (2009) (book review) (identifying "the adoption of torture as government policy [as] dependent on its 'authorization' by Bush administration lawyers" as the theme of both the Mayer and the Sands books).

<sup>108</sup> Eric Schmitt, *Iraq Abuse Trial Is Again Limited To Lower Ranks*, N.Y. TIMES, Mar. 23, 2006, at A1, available at 2006 WLNR 4792647.

<sup>109</sup> See, e.g., Lacroix, *supra* note 61, at 158 (discussing the joint declaration between al-Zawahiri and bin Laden in 1998, creating the World Islamic Front for Jihad against Jews and Crusaders).

<sup>110</sup> See, e.g., Liaquat Ali Khan, *Faith-Based Torture*, 12 GLOBAL DIALOGUE 1 (2010).

<sup>111</sup> *Id.*; see also MAYER, *supra* note 15, at 166–70, 259.

torture of Muslims by the U.S. government.<sup>112</sup> Radical extremist groups have seized on this theme and have utilized it as a rallying cry and a recruitment tool. For young Muslim men and, increasingly, women,<sup>113</sup> the mistreatment of other Muslims by U.S. soldiers is a call to action to join an armed movement that would avenge these injustices.

¶44 It is beyond cavil that U.S. torture policies have had the effect of accelerating the process of radicalization among Muslim communities, and in some instances, fomenting violent reactions in formerly non-violent groups and individuals. As former U.S. Navy General Counsel Alberto Mora explained: “The first and second identifiable causes of U.S. combat deaths in Iraq—as judged by their effectiveness in recruiting insurgent fighters into combat—are, respectively the symbols of Abu Ghraib and Guantánamo.”<sup>114</sup>

¶45 The dehumanizing and illegal torture program, and specifically, that torture executed at Guantánamo Bay, is exacerbated by the fact that some eight or nine years after their initial detention, the testimonies of the victims’ experiences have been omitted from public view. In June 2009, the Obama administration released Combatant Status Review Tribunal (CSRT) transcripts of several “high value” prisoners, including Khalid Sheikh Mohammed who had been waterboarded 183 times in March 2005.<sup>115</sup> The transcripts released on June 15, 2009 were not new, but revealed additional declassified information. In response to a Freedom of Information Act (FOIA) request from the ACLU, the CIA had previously released these transcripts during the Bush administration.<sup>116</sup> The Bush versions omitted almost all references to abusive treatment, and the June 2009 versions remained heavily redacted. For example, when asked to describe the “specific treatments” to which he was subjected during his detention, one of

<sup>112</sup> Appearing on ABC’s *This Week*, Admiral Mike Mullen, Chairman of the Joint Chiefs of Staff, explained, “Well, . . . the concern I’ve had about Guantanamo in these wars is it has been a symbol and one which has been a recruiting symbol for those extremists and jihadists who would fight us.” Transcript of Television Broadcast, *This Week: This Week with George Stephanopoulos*, ABC television broadcast (May 24, 2009), available at 2009 WLNR 9920755.

<sup>113</sup> In March 2010, the October 2009 indictment of Colleen R. LaRose, an American woman calling herself “JihadJane,” was unsealed. Charlie Savage, *Pennsylvania Woman Tied to Plot on Cartoonist*, N.Y. TIMES, Mar. 9, 2010, available at 2010 WLNR 4967176. Irish law enforcement, working with U.S. authorities, arrested LaRose and seven others for planning to kill Lars Vilks, the Dutch cartoonist responsible for the infamous caricatures of the Prophet Muhammad with a dog’s body. *Id.* Jamie Paulin-Ramirez, another American woman, was reportedly arrested with LaRose, but later released in Ireland. Eamon Quinn & John F. Burns, *In Ireland, a Hearing on a Plot to Kill a Swedish Cartoonist*, N.Y. TIMES, Mar. 16, 2010, available at 2010 WLNR 5450985.

<sup>114</sup> *Treatment of Detainees in U.S. Custody: Hearing Before the Senate Comm. on Armed Servs.*, 110th Cong. 5 (2008) (statement of Alberto J. Mora, former Gen. Counsel of the Dep’t of the Navy), available at <http://armed-services.senate.gov/statemnt/2008/June/Mora%2006-17-08.pdf>.

<sup>115</sup> Scott Shane, *Waterboarding Used 266 Times on 2 Suspects*, N.Y. TIMES, Apr. 20, 2009, at A1, available at 2009 WLNR 7331632; Press Release, Am. Civil Liberties Union, CIA Continues To Suppress Information From Detainee Tribunals with Heavy Redactions (June 15, 2009), <http://www.aclu.org/national-security/newly-released-detainee-statements-provide-more-evidence-cia-torture-program>.

<sup>116</sup> *CSRT Censorship*, AM. CIVIL LIBERTIES UNION, March 13, 2008, <http://www.aclu.org/national-security/csrt-foia>.

the prisoners, Abu Zubaydah, responds.<sup>117</sup> But his answer to this question, two pages in length, is completely redacted in both versions of the transcript.<sup>118</sup>

¶46 Although Abu Zubaydah's own story about torture has been erased from the historical record (thus far), an August 2002 OLC memo addressed to John A. Rizzo, General Counsel for the CIA at that time, considered and approved the legality of the following ten methods of "enhanced interrogation": "(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard."<sup>119</sup> During the same month that this memo was authored, Abu Zubaydah was waterboarded no less than eighty-three times.<sup>120</sup>

¶47 But what is still missing from the U.S. public record are Abu Zubaydah's own words about the abuses he suffered.<sup>121</sup> Why is this so important? One of the social harms associated with state-sanctioned torture is the state's control of the prevailing

<sup>117</sup> The ACLU has published the verbatim transcript of the Combatant Status Review Tribunal's hearing for Abu Zubaydah. Transcript of the Combatant Status Review Tribunal at 25, Hearing for Abu Zubaydah, available at [http://www.aclu.org/files/pdfs/safefree/csrt\\_abuzubaydah.pdf](http://www.aclu.org/files/pdfs/safefree/csrt_abuzubaydah.pdf).

<sup>118</sup> *Id.* at 25–27. In comparison, a version of the same transcript made available on the U.S. Department of Defense's website denotes the redactions by two one-word indicators: "[REDACTED]." Verbatim Transcript of the Combatant Status Review Tribunal at 24, Hearing for Abu Zubaydah, available at [http://www.defense.gov/news/transcript\\_ISN10016.pdf](http://www.defense.gov/news/transcript_ISN10016.pdf).

<sup>119</sup> Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to John Rizzo, Acting Gen. Counsel, Cent. Intelligence Agency 2 (Aug. 1, 2002), available at [http://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel\\_Aug2Memo\\_041609.pdf](http://www.washingtonpost.com/wp-srv/nation/pdf/OfficeofLegalCounsel_Aug2Memo_041609.pdf) [hereinafter Bybee II].

<sup>120</sup> "The CIA used the waterboard extensively in the interrogations of [Khalid Sheikh Muhammad] KSM and [Abu] Zubaydah, but did so only after it became clear that standard interrogation techniques were not working." Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., to John A. Rizzo, Senior Deputy Counsel, Cent. Intelligence Agency 8 (May 30, 2005), available at [http://www2.hn.psu.edu/faculty/jmanis/poldocs/ci-torture/olc\\_05302005\\_bradbury.pdf](http://www2.hn.psu.edu/faculty/jmanis/poldocs/ci-torture/olc_05302005_bradbury.pdf) [hereinafter Bradbury Memo].

While the Bush Administration had tagged Abu Zubaydah as a "mastermind" behind the 9/11 attacks and a close confidant of Osama bin Laden, those accusations no longer seem tenable. Peter Finn & Julie Tate, *CIA Mistaken on 'High-Value' Detainee, Document Shows*, WASH. POST, Jun. 16, 2009, available at 2009 WLNR 11459697; Peter Finn & Joby Warrick, *Detainee's Harsh Treatment Foiled No Plots*, WASH. POST, Mar. 29, 2009, available at 2009 WLNR 5880973.

<sup>121</sup> Here, I distinguish between the broader historical record and the U.S. public record. Abu Zubaydah gave a thorough interview to international observers, the substance of which was published by the International Committee of the Red Cross (ICRC). INT'L COMM. OF THE RED CROSS, REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF WAR AND OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (2004). The void in the U.S. public record stands in stark contrast to the details of the U.S. torture program found in international sources. The fact that the "full story" can be gleaned from other sources does not remedy the fact that a gap exists in records kept by the U.S. government. Maher Arar's story is another example of this type of historical censorship. The Second Circuit affirmed a district court decision denying *Bivens* relief and relief under the Torture Victim's Protection Act to Maher Arar, a dual Syrian-Canadian citizen who was apprehended by U.S. immigration officials on suspicion of ties to al-Qaeda while he was at John F. Kennedy International Airport, in New York City, awaiting his return flight to Montreal. *Arar v. Ashcroft*, 585 F.3d 559, 563–64 (2d Cir. 2009) (en banc). After being interrogated in the United States for two weeks, Arar was then rendered to Syria where he was tortured for one year before being released. *Id.* at 566–67. In Canada, the Arar case has already been the subject of an official commission of inquiry, which resulted in a state apology and financial settlement for Arar and his wife. *Id.* at 589–90.

narrative.<sup>122</sup> Professor Muneer Ahmad, one-time legal counsel to the juvenile prisoner Omar Khadr, describes the potent effect of narrative in the Guantánamo context:

As lawyers began to penetrate Guantánamo in the fall of 2004, they learned and exposed prisoner stories of torture and abuse, of mistake and innocence, and of lawless detention, thereby disrupting the government's master narrative of terror. Habeas lawyers' access to the prisoners threw Guantánamo into a new realm of narrative contest, one in which the government participated vigorously, largely through storytelling.<sup>123</sup>

¶48 In Zubaydah's case, the U.S. government had initially conceded that he had been waterboarded, but only once.<sup>124</sup> Yet the OLC memos reveal that high value detainees in U.S. custody were subjected to waterboarding at least 266 times.<sup>125</sup> The truth about torture, including Zubaydah's own testimony, is a vital part of the re-telling of the U.S. narrative about torture.

¶49 Under a new executive administration, the United States now has an opportunity to re-write the national narrative to promote U.S. democratic values. Multiple approaches can be taken, but I argue that the United States must directly confront and correct the "war" metaphor and the "bad apples" mythology. One approach might be to seek criminal prosecutions against CIA agents who tortured and against the Bush administration officials who authorized those practices. But because it appears that, for the moment, there is a lack of political will behind criminal prosecutions,<sup>126</sup> and civil

<sup>122</sup> SHERRILYN A. IFILL, ON THE COURTHOUSE LAWN: CONFRONTING THE LEGACY OF LYNCHING IN THE TWENTY-FIRST CENTURY 128 (2007) (citing PHELPS, *supra* note 21, at 55) ("The restoration of the ability to speak in one's own voice can . . . go a significant way in balancing the harm done.").

<sup>123</sup> Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1717, available at <http://www.law.northwestern.edu/lawreview/v103/n4/1683/LR103n4Ahmad.pdf> (2009).

<sup>124</sup> During an appearance on *ABC News* in 2007, former CIA agent John Kiriakou implied that Abu Zubaydah had been waterboarded only once. Brian Stelter, *How '07 ABC Interview Tilted a Torture Debate*, N.Y. TIMES, Apr. 28, 2009, at A1, available at 2009 WLNR 7964806. According to Kiriakou, Zubaydah had capitulated to the agency's interrogation requests after only "30, 35 seconds" of the procedure. *Id.*

<sup>125</sup> Shane, *supra* note 115.

<sup>126</sup> In February 2010, the Office of Professional Responsibility (OPR) released a report concluding that neither John Yoo nor Judge Jay Bybee, the authors of the infamous torture memos, had acted improperly. OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, REPORT: INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS (2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>; Memorandum from David Margolis, Assoc. Deputy Attorney Gen., to Eric Holder, Attorney Gen. (Jan. 5, 2010), available at <http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf>. Additionally, upon releasing new torture memos from the Office of Legal Counsel in April 2009, President Obama declared that he was opposed to any further investigation into the post-9/11 torture program, stressing the need to "move forward." See Press Release, The White House, Statement of President Barack Obama on Release of OLC Memos (Apr. 16, 2009), [http://www.whitehouse.gov/the\\_press\\_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/](http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Release-of-OLC-Memos/); see also Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. TIMES, Apr. 17, 2009, A1, available at 2009 WLNR 7179998.



suits by torture victims have been unsuccessful in U.S. courts,<sup>127</sup> it may be time to consider the value of a truth commission.<sup>128</sup>

### III. THE INCLUSIVE MODEL FOR SOCIAL HEALING

¶50

The Inclusive Model for Social Healing described in this Part is well-suited for the problem that currently faces the nation as it begins to confront the reality that, in order to win the military battle against al-Qaeda and other Islamist terrorist groups, it must first win the ideological battle for hearts and minds. The narratology of Islamist terrorist organizations relies on a cosmology that separates actors into two categories—“us” or “them.” While U.S. leadership has submitted to a similar worldview in the past, it must

<sup>127</sup> See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1954 (2009) (holding that plaintiff’s *Bivens* complaint failed to state a claim for which relief can be granted); *Rasul v. Myers*, 563 F.3d 527, 532 (D.C. Cir. 2009), *cert. denied*, 130 S.Ct. 1013 (2009) (dismissing *Bivens* claims filed by former Guantánamo detainees on the ground that the military officer defendants were entitled to qualified immunity); *Arar v. Ashcroft*, 585 F.3d 559, 563, 582 (2d Cir. 2009) (dismissing plaintiff’s *Bivens* claim); *Al-Zahrani v. Rumsfeld*, 684 F. Supp. 2d 103, 108–12, 116 (D.D.C. 2010) (dismissing plaintiffs’ civil suit against the United States and various government officials because: (1) section 7 of the Military Commissions Act strips federal courts of their jurisdiction to hear claims “relating to any aspect of the detention . . . of . . . alien[s who are or were] detained by the United States”; (2) national security concerns are a special factor that counsel against the extension of a *Bivens* remedy for the plaintiffs; and, (3) all plaintiffs’ non-constitutional claims are barred by sovereign immunity); see also *Al Shimari v. CACI Premier Tech.*, 657 F. Supp. 2d 700, 731 (E.D. Va. 2009) (dismissing the Alien Tort Statute lawsuit brought by four Iraqi citizens alleging torture against a military contractor employed by the U.S. government to do interrogations at Abu Ghraib prison). But see Dawinder S. Sidhu, *Judicial Review as Soft Power: How the Courts Can Help Us Win the Post-9/11 Conflict* 40 (unpublished manuscript), available at <http://ssrn.com/abstract=1529184> (citing *Rasul*, 563 F.3d 527, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) and *Boumediene v. Bush*, 553 U.S. 723 (2008)) (suggesting that U.S. courts have provided some relief to Muslim petitioners).

<sup>128</sup> The most recent example of the failures of torture victims to achieve redress in U.S. courts comes from the United States Court of Appeals for the Ninth Circuit’s decision in *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010). In *Mohamed*, five plaintiffs sought damages under the Alien Tort Claims Act, claiming that the defendant, Jeppesen Dataplan, “provided direct and substantial services to the United States for its so-called ‘extraordinary rendition’ program.” *Id.* at 1075. Jeppesen Dataplan is a U.S. corporation that, according to the plaintiffs, “provided flight planning and logistical support services to the aircraft and crew on all of the flights transporting each of the five plaintiffs among the various locations [Egypt, Morocco, and Afghanistan] where they were detained and allegedly subjected to torture.” *Id.* at 1074–75. A closely-divided court (6-5) affirmed the district court’s order dismissing the plaintiffs’ complaint, based on the state secrets doctrine. *Id.* at 1084 (citing *United States v. Reynolds*, 345 U.S. 1 (1953)). After a careful analysis of the doctrine, the majority appeared almost apologetic in concluding that concern for national security trumped the plaintiffs’ rights to a public trial on the merits. *Id.* at 1073 (“After much deliberation, we reluctantly conclude this is such a case [where “even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that state secrets are at stake”]) (quoting *Reynolds*, 345 U.S. at 11) (brackets added) (internal brackets omitted). That the majority voted to affirm dismissal is not as intriguing, however, as the last few pages of its opinion, where Judge Fisher quite unexpectedly concludes by advocating for alternative remedies for the plaintiffs—namely, reparations. *Id.* at 1091–92 (suggesting that the reparations made by the U.S. government to Japanese Latin Americans (JLAs) after World War II be seen as one exemplar). Cf. *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070, 1101 (Hawkins, J., dissenting) (countering that the majority’s recommendation for non-judicial remedies is “insufficient” because they “leave[] to the legislative [and executive] branch[es] claims which the federal courts are better equipped to handle.”) (citing *Kosak v. United States*, 465 U.S. 848, 867 (1984) (Stevens, J., dissenting)).

now reject this exclusive categorization. The Inclusive Model for Social Healing, and namely a truth commission-style forum to investigate the post-9/11 torture program, directly confronts the exclusive terrorist ideology and provides an alternative narrative of inclusion premised upon social healing. The Inclusive Model for Social Healing is part of a long lineage of reparative efforts in the United States.<sup>129</sup> So, prior to describing the new model, this Part will trace the evolution of reparations theory and practice by considering the various judicial and non-judicial mechanisms that reparations advocates have utilized in the past. The use of truth commissions is perhaps the most recent development in this evolution. Drawing upon the lessons learned by the truth projects in Tulsa, Oklahoma and Greensboro, North Carolina, this Part closes with a description of my proposal for an Inclusive Model for Social Healing.

#### A. *An Abbreviated History of Reparations Efforts in the United States*

¶51 With varying degrees of success, groups in the United States seeking to right historical wrongs have petitioned legislatures and the courts to do so since at least 1710, when families of the men and women who were accused of being witches in colonial Massachusetts sought compensation for damages resulting from the unjust prosecutions.<sup>130</sup> Between then and now, many consider the Civil Liberties Act of 1988 (CLA) the high-water mark of the modern reparations movement.<sup>131</sup> In recognition of the injustices suffered by Japanese Americans through the federal government's forced relocation and internment program during World War II,<sup>132</sup> Congress authorized a \$20,000 reparation payment for each of the remaining survivors of the internment camps.<sup>133</sup> In addition to the financial compensation offered to survivors, the CLA's

<sup>129</sup> Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L. J. 81, 82 (2004) [hereinafter Brophy, *Reparations Talk*] (discussing the multi-generational lineage of reparations discourse).

<sup>130</sup> See ALFRED L. BROPHY, REPARATIONS PRO & CON 30–33 (2006); Alfred L. Brophy, *Reconsidering Reparations*, 81 IND. L. REV. 811, 820–22 (2006) (providing table of reparations projects throughout U.S. history). Brophy's table lists 1725 as the relevant year, but other historians note that the first petition for compensation relating to the unjust prosecution of men and women accused as witches was in 1710. See *Petitions for Compensation and Decision Concerning Compensation, 1710–1711*, SALEM WITCH TRIALS 1692, [http://www.law.umkc.edu/faculty/projects/ftrials/salem/SAL\\_PET.HTM](http://www.law.umkc.edu/faculty/projects/ftrials/salem/SAL_PET.HTM). In 1711, Joseph Dudley, the colonial governor, awarded a total of 578 pounds and 12 shillings to nineteen sets of petitioners. *Id.*; see also PETER CHARLES HOFFER, THE SALEM WITCHCRAFT TRIALS: A LEGAL HISTORY 137–44, 151 (1997).

<sup>131</sup> See Civil Liberties Act of 1988, 50 App. U.S.C. § 1989 (1988). Professor Eric K. Yamamoto and Ashley Kaiao Obrey provide a thorough history of the Japanese American Redress movement in their article, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*. Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing Through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 11–18 (2009). The authors contextualize the beginnings of Japanese American Redress in the African American Civil Rights movement of the late 1960s and to a growing ethnic studies student movement on university campuses. *Id.*

<sup>132</sup> Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the Secretary of War to prescribe military areas); *Korematsu v. United States*, 323 U.S. 214 (1944) (affirming the constitutionality of Executive Order 9066).

<sup>133</sup> Yamamoto & Obrey, *supra* note 131, at 16–18. It is less well known that the same act provided financial restitution for native Aleutians who were evacuated from their homes in Alaska by the U.S. military during the same time period. ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY

reparations package included an official apology.<sup>134</sup> Therefore, a letter of apology signed by President George H.W. Bush accompanied each reparation payment.<sup>135</sup> In it, the President acknowledged that money and words alone could not right past wrongs, but expressed his hope that the CLA might signal a renewal of the nation's "traditional commitment to the ideals of freedom, equality, and justice."<sup>136</sup> The CLA also provided for a fund devoted to a public education campaign.<sup>137</sup>

¶52

Encouraged by the success of the Japanese American redress movement, reparations advocates filed nine federal lawsuits in 2002 based on claims regarding the injustices of antebellum slavery and on the continuing contemporary adverse impacts associated with the history of slavery in the United States.<sup>138</sup> The class action lawsuit filed by Deadria Farmer-Paellmann in March 2002 is representative of the other lawsuits filed in various U.S. federal district courts that same year.<sup>139</sup> On behalf of herself and all descendants of African American slaves, Farmer-Paellmann claimed, *inter alia*, that the three named corporate defendants (as successors-in-interest to antebellum U.S. companies) had been unjustly enriched by slavery.<sup>140</sup> The complaint estimated that the current value of unpaid slave labor performed between 1790 and 1860 might be as much

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KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE INTERNMENT 405–06 (2001). Perhaps least well known is the story of the JLAs who were not beneficiaries of the Civil Liberties Act (CLA) because they were not U.S. citizens. *Id.* at 428–30. During WWII, the United States engaged in kidnapping operations in Latin America, mainly in Peru, targeting individuals of Japanese descent. *Id.* The goal was to use these individuals as hostages in negotiations with Japan for the return of U.S. prisoners of war. *Id.* After the war, the JLAs were stateless people, not belonging in the United States, any country in Latin America, or Japan. *Id.* In 1998, the federal government settled a class action lawsuit on the JLAs' behalf. Eligible claimants were paid \$5,000 each. Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C.L. REV. 275, 276 (1998).

<sup>134</sup> One of the purposes of the CLA is to "apologize on behalf of the people of the United States for the evacuation, relocation, and internment of the citizens and permanent resident aliens of Japanese ancestry[.]" Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

<sup>135</sup> YAMAMOTO, CHON, IZUMI, KANG & WU, *supra* note 133, at 401.

<sup>136</sup> *Id.*

<sup>137</sup> The Civil Liberties Public Education Fund "sponsor[s] research and public education activities . . . to publish and distribute the hearings, findings, and recommendations of the Commission, so that the events surrounding the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood." 50 App. U.S.C. § 1989b-5(b)(1) (2006); *see also* Yamamoto & Obrey, *supra* note 131, at 5.

<sup>138</sup> Eric K. Yamamoto, Susan K. Serrano & Michelle Natividad Rodriguez, *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1296 (2003).

<sup>139</sup> Charles Ogletree, *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 279–80 (2003); *see also* *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 756 (7th Cir. 2006) (discussing the consolidation of ten lawsuits seeking damages arising from "the enslavement of black people in America"); *In re African-Am. Slave Descendants Litig.*, 231 F. Supp. 2d 1357, 1358 (J.P.M.L. 2002) (ordering consolidation of four actions seeking reparations for descendants of African American slaves).

<sup>140</sup> Complaint & Jury Trial Demand ¶¶ 20–21, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004) (No. CV-02-1862), *available at* <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/slavery/fpllmnflt032602cmp.pdf> [hereinafter *Farmer-Paellmann Complaint*].

as \$1.4 trillion.<sup>141</sup> The Farmer-Paellmann class action sought “an accounting, constructive trust, restitution, disgorgement and compensatory and punitive damages arising out of Defendants’ past and continued wrongful conduct.”<sup>142</sup>

¶53 In 2006, the United States Judicial Panel on Multidistrict Litigation consolidated each of the nine lawsuits that were filed in the federal courts, in addition to a tenth originally filed in state court but later removed.<sup>143</sup> The consolidated cases appeared before Judge Charles R. Norgle, Sr. of the United States District Court for the Northern District of Illinois.<sup>144</sup> In 2005, Judge Norgle dismissed with prejudice the consolidated lawsuits based mainly on procedural grounds.<sup>145</sup> Judge Norgle found that the district court lacked jurisdiction over the suits because the plaintiffs lacked standing to sue and the suits were time-barred.<sup>146</sup> Judge Richard A. Posner, writing for a unanimous panel on the United States Court of Appeals for the Seventh Circuit, affirmed on these grounds.<sup>147</sup>

¶54 After the sting of the dismissals subsided, reparations advocates took stock of the situation and began the struggle for redress and justice anew.<sup>148</sup> In the aftermath of the dismissals, a few important lessons emerged. Perhaps conventional litigation strategy was not the best route to achieve justice. A compensatory remedies litigation model for reparations was unsatisfying on both a strategic and an emotional level. As Professor Sherrilyn A. Ifill acknowledged, reparations “cannot fully ‘repair’ the damage done by racial . . . violence; nor can reparations ‘return’ a victim or a victimized community to the state it would have been in.”<sup>149</sup> Reparations advocates searched for a new framework that could both adequately communicate the nature of historical wrongs and achieve justice.

¶55 As both Professor Eric K. Yamamoto and Judge Posner acknowledged, the slavery-based reparations lawsuits utilized a traditional tort litigation-compensation model.<sup>150</sup> The plaintiffs sought “conventional legal relief” in federal court for violations of state and federal law. Predictably then, the plaintiffs faced “conventional defenses to a lawsuit[,]” namely the constitutional standing requirement and the statute of limitations.<sup>151</sup>

<sup>141</sup> *Id.* ¶ 10.

<sup>142</sup> *Id.* ¶ 21.

<sup>143</sup> *In re African-Am. Slave Descendants Litig.*, 471 F.3d at 756 (discussing the consolidation of ten lawsuits seeking damages arising from “the enslavement of black people in America”); *In re African-Am. Slave Descendants Litig.*, 231 F. Supp. 2d at 1358–59 (ordering consolidation of four actions seeking reparations for descendants of African American slaves).

<sup>144</sup> In 2004, Judge Norgle had previously dismissed, without prejudice, the plaintiffs’ First Consolidated Complaint. *In re African-Am. Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1075 (N.D. Ill. 2004) (holding that the plaintiffs had failed to state a cause of action, lacked standing, and that the suit was barred by the statute of limitations and by the political question doctrine).

<sup>145</sup> *In re African-Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721 (N.D. Ill. 2005). Citing a separate grounds for dismissal, Judge Norgle called the dispute between the plaintiffs and the defendants a “political question” and, thus, not subject to resolution by a court. *Id.* at 765–66.

<sup>146</sup> *Id.* at 779–80.

<sup>147</sup> *In re African-Am. Slave Descendants Litig.*, 471 F.3d at 763.

<sup>148</sup> See Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 31 (2007).

<sup>149</sup> IFILL, *supra* note 122, at 124.

<sup>150</sup> *In re African-Am. Slave Descendants Litig.*, 471 F.3d at 758; Yamamoto, Serrano & Rodriguez, *supra* note 138, at 1296.

<sup>151</sup> *In re African-Am. Slave Descendants Litig.*, 471 F.3d at 758–79.

¶56 In his opinion dismissing the lawsuits, Judge Posner expressed his additional concern that “there is no way in which to determine what if any injury the defendants inflicted on the members of the plaintiff classes.”<sup>152</sup> Specifically, the court noted: “There is no way to determine that a given black American today is worse off by a specific, calculatable sum of money (or monetized emotional harm) as a result of the conduct of one or more of the defendants.”<sup>153</sup> In other words, the court could not perceive how the present-day descendants of African American slaves were actually harmed by the fact that the corporate defendants (or their predecessors in interest) engaged in businesses that provided transportation, finance, and insurance services to slave owners. Even if he was narrowly tailoring his critique of the slavery litigation to this particular class of plaintiffs, in doing so, Judge Posner highlighted an additional hurdle for any similar plaintiff—the problem of establishing a causal chain linking unredressed historical wrongs to harms felt and experienced in the present.

¶57 Ironically, part of the answer to the causation problem raised by the Seventh Circuit can be found in the failed slavery reparations litigation itself. True, the legal arguments contained therein were framed mainly in conventional terms. The plaintiffs identified specific violations of state laws prohibiting the slave trade and sought traditional legal remedies such as restitution and compensation.<sup>154</sup> However, in addition to claiming individualized injuries, the litigation efforts initiated by Farmer-Paellmann and the other plaintiffs had also raised novel group-based claims and sought group-based remedies.<sup>155</sup> The lawsuits invoked the language of harms to the larger group (all descendants of U.S. slaves) and therefore sought damages payable to this entire group.<sup>156</sup>

¶58 The claim that the government-supported institution of slavery had resulted in broad group-felt harms in the present day is one factor characteristic of the shifting focus in what Professor Yamamoto identifies as a “fourth generation” of reparations theory.<sup>157</sup> The “third generation” had pushed the theory of reparations into the real world of practice, electing a litigation model as a means of achieving compensation for African

<sup>152</sup> *Id.* at 760.

<sup>153</sup> *Id.*

<sup>154</sup> *In re African-Am. Slave Descendents Litig.*, 375 F. Supp. 2d 721, 726–28, 740 (N.D. Ill. 2005) (discussing plaintiff’s Second Consolidated and Amended Complaint and Jury Demand, which alleged violations of “laws that outlawed the trafficking and trade of slaves, which progressed into a body of law that found the institution of slavery to be contrary to the Natural Law of Man”); *see also* First Consolidated and Amended Complaint and Jury Demand ¶¶ 27–36, *Farmer-Paellmann v. FleetBoston Fin. Corp.*, 471 F.3d 754 (7th Cir. 2005) (Nos. 02 C 7764, 02 CV 1862 (CRN), 02 CV 1864 (CRN), 02 CV 1863 (CRN), 02 CV 6961 (CRN), 02 CV 2084 (CRN), 02 CV 6180 (CRN), 03 CV 036 (CRN), 02 CV 2712 (CRN)) (alleging violations of northern states’ laws prohibiting slavery, even prior to the Thirteenth Amendment).

<sup>155</sup> Yamamoto, Serrano & Rodriguez, *supra* note 138, at 1304.

<sup>156</sup> *Cf.* RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 199–234 (2000) (championing group-based reparations for African Americans in the form of a government-funded private trust); Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, 19 B.C. THIRD WORLD L. J. 429, 468 (1998) (advocating group-based versus individual reparations). Of course, determining membership in the large class of descendants of African slaves presents practical challenges. Foreseeing the federal government’s likely requirement for some guidelines for eligibility, Professor Kevin Hopkins considers three possible approaches: (1) genealogical evidence; (2) a blood quantum rule; and, (3) DNA testing. Kevin Hopkins, *Forgive U.S. Our Debts? Righting the Wrongs of Slavery*, 89 GEO. L.J. 2531, 2542–47 (2001).

<sup>157</sup> Yamamoto, Kim & Holden, *supra* note 148, at 16 (citing Brophy, *Reparations Talk*, *supra* note 129, at 81–84).

Americans who were injured by the contemporary effects of slavery and Jim Crow laws.<sup>158</sup> Fourth generation reparations advocates acknowledged the limitations of a litigation model, and turned their attention to litigation alternatives, informed in large part by international reparations efforts.<sup>159</sup> In Professor Yamamoto's estimation, the "fourth generation coalesces generally around three dimensions of 'repair': recognizing and accepting responsibility for historic injustice; repairing present-day damage traceable to past injustice; and building productive group relationships."<sup>160</sup> But reorienting advocacy efforts around the primary objective of repair still presupposes the harm. As illustrated by the Seventh Circuit's decision in *In re African-American Slave Descendants Litigation*, the legal causation issue is one that stymied third generation litigation claimants. Part of the project for reparations advocates now, then, is to establish some record or narrative of the group-based or social harm, tied to but distinguished from individual ones.

### B. The Truth Projects in Tulsa and Greensboro

¶59 Inspired by international efforts at fourth generation reparations theory and practice, such as the South African Truth and Reconciliation Commission (SATRC), community members in the U.S. cities of Tulsa, Oklahoma and Greensboro, North Carolina convened commissions of inquiry charged with investigating historical wrongs and addressing the current impact of those past wrongs on the affected communities.<sup>161</sup> The Tulsa Race Riots Commission (TRRC) was established in 2000 by the State of Oklahoma and was charged by statute to conduct an investigation into the 1921 riot that destroyed the African American community of Greenwood and to produce an official report recording the commission's findings.<sup>162</sup> The Greensboro Truth and Community Reconciliation Project, funded in part by a grant from the Andrus Family Fund, was established in 2001.<sup>163</sup> The Greensboro Truth and Reconciliation Commission (GTRC), formed thereafter, completed its mandate in 2006 when it published its final report on its investigation of the "context, causes, sequence and consequences" of the November 3, 1979 massacre (November 3rd) in Greensboro, North Carolina.<sup>164</sup> On that day, five civil

<sup>158</sup> *Id.* at 21–24.

<sup>159</sup> *Id.* at 51–64.

<sup>160</sup> *Id.* at 31 (citation omitted).

<sup>161</sup> The truth projects in Tulsa and Greensboro are not sui generis. To the contrary, commissions of historical inquiry charged with investigating the truth behind past racial injustices in the United States have proliferated in the past twenty years. See LERAE UMFLEET, 1898 WILMINGTON RACE RIOT COMMISSION, 1898 WILMINGTON RACE RIOT REPORT (2006), available at <http://www.history.ncdcr.gov/1898-wrrcF/report/report.htm> (reporting on the Wilmington Race Riot in Wilmington, North Carolina); BROPHY, *supra* note 130, at 50–51 (discussing Florida's historical commission for the 1923 Rosewood Massacre); IFILL, *supra* note 122, at 174 (regarding the regional Southern Truth and Reconciliation (STAR) network in the southern United States).

<sup>162</sup> H.J. Res. 1035 (Okla. 1997) (enacted).

<sup>163</sup> *Pre-Commission (2001-2004)*, GREENSBORO TRUTH & RECONCILIATION PROJECT, <http://www.gtrc.org/groundwork.php>. On April 19, 2005, the Greensboro City Council voted 6-3 to reject the work of the Greensboro Truth and Reconciliation Commission (GTRC), a vote along racial lines. GREENSBORO TRUTH AND RECONCILIATION COMMISSION, GREENSBORO TRUTH AND RECONCILIATION COMMISSION FINAL REPORT 25 (2006), available at <http://www.greensborotrc.org/> [hereinafter GTRC REPORT].

<sup>164</sup> See *id.*

rights demonstrators were killed during a “Death to the Klan” rally when they were fired upon by white supremacists associated with the Ku Klux Klan (KKK, or Klan) and Nazi party.<sup>165</sup>

¶60 The Tulsa and Greensboro truth projects are significant because they mark a departure from litigation as a strategy to achieve redress for communities presently affected by historical wrongs. In doing so, the TRRC and GTRC engaged in a dramatic reframing of reparations goals. Rather than pursuing compensatory claims in the retributive justice model of litigation, the commissioners in these truth projects sought to take preliminary steps to explain how tragic events that claimed individual victims actually impacted a much broader swath of society, including the alleged perpetrators and other bystanders.<sup>166</sup>

¶61 The commissioners envisioned concrete, pragmatic goals for reparations pursuant to a truth project. The immediate goal was to conduct an official investigation and to create an official record of the racial violence that had impacted both communities.<sup>167</sup> This public record, then, would serve as the foundation for future efforts at social healing and reconciliation. As the GTRC noted in its 2006 report:

Nothing can restore a loved one’s life that has been taken, or restore the health and well-being of those battered by the events, but we believe that some meaningful gestures towards acknowledgment and redress can help those most harmed see a better future ahead. We believe that facing the truth about the past is an important first step toward repair.<sup>168</sup>

¶62 The GTRC invited participation from those who opposed or were otherwise critical of its work. Some of these were former Klan members or Greensboro police officers who were held responsible for the November 3rd massacre.<sup>169</sup> By including the statements of these individuals, the GTRC was creating an explicitly inclusive historical record of events. The GTRC hearings were meant to lay a foundation for a common historical narrative for the entire community, in much the same way that the Truth and Reconciliation Commission in South Africa approached its mission.

The commissioners of the [South African] TRC maintain that there are different kinds of “truth,” that there is a narrative or social truth separate

<sup>165</sup> See Greensboro Truth and Community Reconciliation Project, *Mandate for the Greensboro Truth and Reconciliation Commission*, available at <http://www.greensborotrc.org/mandate.doc> [hereinafter GTRC *Mandate*].

<sup>166</sup> The GTRC’s mandate placed its work squarely within the framework of restorative justice, specifically rejecting the limitations inherent in a retributive justice system. GTRC REPORT, *supra* note 163, at 28. Principle Four of the GTRC’s Guiding Principles provides: “We commit ourselves to the ideal of restorative justice, freed from the need to exact revenge or make recriminations.” *Id.* at 461.

<sup>167</sup> See OKLA. COMM’N TO STUDY THE TULSA RACE RIOT OF 1921, TULSA RACE RIOT (2001), available at <http://www.okhistory.org/trrc/freport.pdf> [hereinafter TULSA REPORT]; GTRC REPORT, *supra* note 163, at 16–17.

<sup>168</sup> GTRC REPORT, *supra* note 163, at 200.

<sup>169</sup> Besides Pierce, the GTRC took statements from, among others, Virgil Griffin (former Imperial Wizard of the Cleveland KKK, and a member of the Klan-Nazi caravan on November 3, 1979 (November 3rd)); Captain R.D. Ball and Sergeant M. Toomes, of the Greensboro Police Department; and Richard Koritz, former member, Human Relations Commission. See *id.* at 520.

from a legal or forensic truth. This narrative truth, they claim, is an important aspect of reconciliation in so far as it develops a common historical narrative, a national story that brings all together in acknowledgment of past wrongs. This national acknowledgment, in turn, requires individual acknowledgment of harms committed. It also requires apology and forgiveness, so that individual acts of contrition and absolution can blend into a national act of reconciliation.<sup>170</sup>

¶63 The conciliatory power of a truth commission comes from the participation of all affected parties: those who were directly victimized, those who perpetrated the abuses, and even those who continue to be affected by the enduring legacy of the abuses. The GTRC interviewed 200 people, including numerous witnesses present on the day of the massacre.<sup>171</sup> The GTRC's report was enhanced also by consideration of the personal statements of a multitude of others who were not actually present, but whose lives had nonetheless been affected by the events on November 3rd.<sup>172</sup>

¶64 Joseph Gorrell Pierce, a community resident and Grand Dragon of the Federated Knights of the Klan in 1979, was one of those individuals.<sup>173</sup> Pierce spoke before the GTRC during the first of its public hearings in July 2005.<sup>174</sup> Pierce was not present in Greensboro on the day of the massacre, but spoke about a similar confrontation between armed Klan members and armed Communist Workers Party (CWP) protestors that took place in China Grove, North Carolina a few months before.<sup>175</sup> According to Pierce, tensions between the Klan and the CWP had been simmering for some time.<sup>176</sup> When the Klan hosted a screening of D.W. Griffith's "Birth of a Nation" in China Grove, they were confronted by a "Death to the Klan" rally.<sup>177</sup> Pierce testified that violence was averted only because he directed his members to empty the public streets and to go inside to watch the film.<sup>178</sup>

¶65 Interestingly, in giving his personal statement, Pierce used the language of victimhood, claiming that identity for himself while denying it to the City of Greensboro:

I'm a victim of November 3. Matters after that. I've been tried in federal court more than[] any man living in the United States. And I've done about eight years in the federal penitentiary. Don't want to go back, and I wouldn't want to send any of you there. I'm a victim. I'm not sure if Greensboro ever really was a victim. What happened in China Grove happened, and it kinda missed the media because nobody got hurt. What

<sup>170</sup> Rhoda E. Howard-Hassmann & Mark Gibney, *Introduction: Apologies and the West, in THE AGE OF APOLOGY: FACING UP TO THE PAST* 1, 4–5 (Mark Gibney, et al. eds., 2008).

<sup>171</sup> GTRC REPORT, *supra* note 163, at 3.

<sup>172</sup> *Id.* at 34.

<sup>173</sup> Transcript, Joseph Gorrell Pierce, First Public Hearing of the Greensboro Truth and Reconciliation Commission (July 16, 2005), *available at* <http://www.greensborotrc.org/pierce.doc> [hereinafter Pierce Transcript].

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*



happened in here could have happened in Charlotte, it could have happened in Raleigh, it could have happened in Richmond, Chicago, Detroit, Philadelphia, Washington D.C. It's never been a black eye in my opinion on the city of Greensboro.

The city of Greensboro can be proud of itself. And a lot of change happened here. The Continental Army laid an ass whooping on Cornwallis right down the road here when he went to Yorktown and surrendered. And I'm very proud of that. And we go right down here to Woolworth's, and that's where the civil rights movement began. Right there. Greensboro has a lot to be proud of. They needn't be ashamed of November 3. It was one of those things that happened and it was not orchestrated by the city of Greensboro to happen. It was not orchestrated by me and I don't think anybody on the other side, if they could turn the clock back, they'd change it too. But it happened. And I've had to live with it, I've thought about it every day of my life since then. And you can bet every day I was in the federal penitentiary I thought about it two or three times that day. And those eighty-eight seconds, that's how long it lasted. And eight people died. According to the FBI, there was two hundred some rounds exchanged. But it wasn't the city's fault, it wasn't my fault, it wasn't no one person's fault. They don't even know who fired the first shot. Like I told everybody, all it takes is a firecracker, and it did.<sup>179</sup>

¶66 Pierce's statement to the GTRC provides some historical context to the November 3rd events that may have been obscured without his participation. Earlier in his statement, Pierce produced a fascinating account of how he came to be a Klan member: "I . . . loved . . . to study North Carolina history[.] And down this road I went. Had I been born in New York City, I probably would have made a good Communist. But being born in [Forsyth County], where I was, made me a very good Klansman."<sup>180</sup> His statement also illustrates the power of narrative in a truth commission forum.<sup>181</sup> The Commissioners and the public who attended the hearings listened to the perspective of a Klan member associated with the men charged with the murders on November 3rd.

¶67 Although he was skeptical of the GTRC's work, Pierce's testimony before the Commission helped the GTRC achieve one of its most important tasks: to connect the dots between past events and contemporary impacts. In his own words, Pierce tied seemingly disparate historical events together to form a single, cohesive picture. By linking his boyhood in the rural South to the Civil Rights movement, to the deadly confrontation between the Klan and CWP members on November 3rd, and to his claimed victimhood status in the present, Pierce demonstrated the existence of a causal chain linking his past (and by representation, his community's past) to his (and his community's) present. Pierce's statement is also a testimony to the need that bystanders,

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 65 (1998) (describing the potential therapeutic benefits for trauma survivors who participate in truth projects).

or those individuals not directly impacted by the critical events, have for some type of healing.

¶68 In its trans-historical reparative effort, the GTRC devoted an entire chapter of its final report to drawing links between the tragedy of November 3rd and contemporary social harms experienced by the residents of Greensboro.<sup>182</sup> The GTRC identified a number of continuing consequences of the November 3rd tragedy, including: individuals' physical and emotional trauma; social ostracization and lack of employment opportunities for CWP members; a general community sense of skepticism and suspicion about the police, the courts, and the news media.<sup>183</sup> The GTRC listed "denial of responsibility for community problems" as another adverse consequence.<sup>184</sup> Further, the GTRC explicitly acknowledged group-based harms incident to the November 3rd tragedy. These included:

- [The] residents of the City of Greensboro, which lost ground on human relations progress made after school desegregation;
- [T]he relatives and associates of both CWP demonstrators and Klan-Nazi shooters, who were stigmatized and suffered various forms of backlash;
- [P]rogressive grassroots organizers whose work was made more difficult by such processes as red-baiting; [and]
- [M]ill workers and other low-income residents who would have been beneficiaries of more successful organizing for racial and economic justice.<sup>185</sup>

¶69 The GTRC Report's chapter on continuing consequences contains direct quotes from individuals who had presented public statements for the Commission, thus reinforcing the power of narrative participation. In the words of one survivor:

I think we're worse today than we were all those years ago because now we've gone into a hiding that is covered up by things. We've not been able to pull away from things to see what the truth is today. We're so suspicious of each other that there is little or no trust in our community.<sup>186</sup>

Contributing to the general sense of distrust, in both Tulsa and Greensboro, the existing legal mechanisms had failed to bring justice or social healing to the affected communities.

¶70 Neither the criminal justice system nor the civil courts provided any relief for the victims of the Tulsa race riot. In less than twenty-four hours during the spring of 1921, a

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<sup>182</sup> GTRC REPORT, *supra* note 163, at ch. 12.

<sup>183</sup> *Id.* at 340.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* subsec. Recommendations, at 200.

<sup>186</sup> *Id.* at 348 (quoting Tammy Tutt, a juvenile resident of Morningside Homes on November 3rd).

mob composed of white men deputized by the City of Tulsa,<sup>187</sup> uniformed police, and units of the Oklahoma National Guard destroyed the African American neighborhood of Greenwood.<sup>188</sup> None of the seventy people indicted in connection to the riot were ever prosecuted.<sup>189</sup> When insurance companies rejected claims for property damage resulting from the riot, Greenwood residents filed over 100 lawsuits against those insurance companies as well as the City of Tulsa.<sup>190</sup> None of these claims went to trial, however, after the Oklahoma Supreme Court validated the riot clause in one property owner's fire insurance policy, exempting coverage for losses directly or indirectly caused by a riot.<sup>191</sup> In 2003, Harvard law professor Charles Ogletree, seasoned litigator Johnnie Cochran, and other lawyers joined forces to file a reparations lawsuit on behalf of the survivors of the 1921 Tulsa Race Riot.<sup>192</sup> That complaint was dismissed by the United States District Court for the Northern District of Oklahoma.<sup>193</sup>

¶71 The judicial system in Greensboro, North Carolina produced similarly disappointing results. In the immediate aftermath of the November 3rd killings, state and federal prosecutors charged members of the Klan and the Nazi party with the murders of the five CWP members killed on November 3rd.<sup>194</sup> But in both state and federal court, juries acquitted the criminal defendants.<sup>195</sup> And although some plaintiffs won a civil verdict against Klan members, Nazi Party members, and the Greensboro Police Department (GPD), the damage award arguably caused even deeper wounds.<sup>196</sup> The jury found the defendants joint and severally liable,<sup>197</sup> but the city paid the entire damages

<sup>187</sup> Professor Brophy notes that the Tulsa police chief had deputized up to 500 men. Alfred L. Brophy, *Assessing State and City Culpability: The Riot and the Law*, in TULSA REPORT, *supra* note 167, at 153, 159 [hereinafter Brophy, *Assessing State and City Culpability*].

<sup>188</sup> John Hope Franklin & Scott Ellsworth, *History Knows No Fences: An Overview*, in TULSA REPORT, *supra* note 167, at 21, 22 (comparing the city's active response to memorialize the April 19, 1995 bombing of the Alfred P. Murrah Federal Building to the forgotten 1921 riot). Greenwood Avenue, Greenwood's commercial district, was known as "the Black Wall Street of America." TULSA REPORT, *supra* note 167, at viii.

<sup>189</sup> Brophy, *Assessing State and City Culpability*, *supra* note 187, at 167.

<sup>190</sup> *Id.* at 166.

<sup>191</sup> *Id.* at 166–67 (citing *Redfearn v. Am. Cent. Ins. Co.*, 243 P. 929, 931 (Okla. 1926)).

<sup>192</sup> Charles J. Ogletree Jr., *Tulsa Reparations: The Survivors' Story*, in REDRESS FOR HISTORICAL INJUSTICES IN THE UNITED STATES: ON REPARATIONS FOR SLAVERY, JIM CROW, AND THEIR LEGACIES 452, 455 n.23 (Michael T. Martin & Marilyn Yaquinto eds., 2007). The complaint alleged, *inter alia*, constitutional civil rights violations as well as Section 1983 civil rights claims. Second Amended Complaint, John Melvin Alexander v. Okla., No. 03-CV-133 E (c) (10th Cir. Apr. 29, 2003), available at <http://www.tulsareparations.org/> (follow "complaint has been filed" hyperlink).

<sup>193</sup> The U.S. District Court for the Northern District of Oklahoma dismissed the complaint, finding that the plaintiffs' claims were time-barred and that equitable tolling principles did not apply. *See Alexander v. Okla.*, 382 F.3d 1206, 1212–13 (10th Cir. 2004) (affirming dismissal). On appeal, the plaintiffs argued that the racially hostile environment in Oklahoma in the decades following the 1921 Tulsa Race Riot had eliminated any meaningful opportunity to seek redress in Oklahoma courts within the two-year statute of limitations period. *Id.* at 1216. The U.S. Court of Appeals for the Tenth Circuit rejected this argument. *Id.* at 1219–20 (reasoning, in part, that civil rights legislation in the 1960s had signaled the end of the racially hostile environment complained of by plaintiffs).

<sup>194</sup> GTRC REPORT, *supra* note 163, at 260.

<sup>195</sup> *Id.* at 279–90.

<sup>196</sup> *Id.* at 304–08.

<sup>197</sup> *Id.* at 307–08.

amount, effectively indemnifying the Klan and Nazi defendants.<sup>198</sup> In 2006, when the GTRC completed its investigation and report, it noted that the community continued to suffer from unhealed wounds despite the fact that the perpetrators of the November 3rd killings had been called to account in the courts through civil and criminal trials. As one Greensboro resident explained: “Over the years I’ve realized that assigning blame is too simple to be true. I hoped to find some reconciliation within myself as part of this [GTRC] process.”<sup>199</sup>

¶72

The GTRC’s report ends with a series of recommendations designed to address restorative justice goals of community reconciliation and social healing. The recommendations are divided into four categories: “General steps toward reconciliation,” “Institutional reform,” “Criminal Justice and Civil Remedies,” and “Citizen transformation/engagement.”<sup>200</sup> The “General steps toward reconciliation” included recommendations for several public reparative acts, including apologies by those “who were responsible for any part of the tragedy,” museum exhibits to educate the public about November 3rd, and the construction of a public monument to commemorate the tragedy.<sup>201</sup> “[T]o prevent future abuses and ensure that when wrongs do occur there is an adequate response,” the GTRC recommended institutional reforms, including anti-racism training for all city and country employees and the establishment of a community justice center in Greensboro.<sup>202</sup> To broaden the impact of these proposed institutional reforms, the GTRC encouraged individual citizens to become committed to identifying and solving social problems and to participating in anti-racism and diversity training.<sup>203</sup> Importantly, while it critiqued the judicial system for failing to bring social healing to the affected community, the GTRC did not discount the role of the courts altogether. The GTRC recommended that investigations into the allegedly corrupt practices of the Greensboro Police Department continue, and that, if appropriate, “criminal prosecutions or civil action should be pursued.”<sup>204</sup>

### C. Truth Commissions and the Inclusive Model for Social Healing

¶73

The truth projects by the City of Tulsa and the GTRC are forerunners in a new strategic framework for reparations practice. These truth projects incorporate what I will call an Inclusive Model for Social Healing. By contrast, the litigation strategies utilized by third generation reparation advocates employed an exclusive model for social healing. The distinction is significant. Under the litigation model, reparations advocates had to shape their claims for relief to conform to procedural rules.<sup>205</sup> This meant having to draw one set of bright lines around a class of individuals with injuries and another set around a

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 343–44 (quoting Winston Cavin, a Greensboro Daily News reporter and witness of the November 3rd tragedy).

<sup>200</sup> *Id.* subsec. Recommendations, at 200–06.

<sup>201</sup> *Id.* subsec. Recommendations, at 200–01.

<sup>202</sup> *Id.* subsec. Recommendations, at 202–04.

<sup>203</sup> *Id.* subsec. Recommendations, at 206–07. This broad spectrum of reparative acts recalls the varied approach taken by the U.S. Congress in promulgating the Civil Liberties Act of 1988. *See* discussion *supra* Part III.A.

<sup>204</sup> GTRC REPORT, *supra* note 163, subsec. Recommendations, at 206.

<sup>205</sup> *See, e.g.*, FED. R. CIV. P. 8 (notice pleading); FED. R. CIV. P. 17 (parties to litigation).

class of the blameworthy.<sup>206</sup> Lawsuit plaintiffs were classified as victims on one side of the “v.” and lawsuit defendants classified as perpetrators on the other.<sup>207</sup> In the slavery reparations litigation, for example, all descendants of African American slaves stood to benefit as members of the plaintiff class,<sup>208</sup> but this exclusive model did not and could not contemplate how others besides African Americans have also been adversely impacted by the legacy of slavery and racial segregation in the United States.<sup>209</sup> Nor could the exclusive litigation model provide a causal theory of widespread group harms based on past events. Additionally, while the plaintiffs had expended many research hours tracing the corporate lineage of the antebellum companies who benefitted from the slave economy, no legal theory could capture the culpability shared by federal and state government and other social institutions for maintaining and enforcing a legal system that regulated ownership of other human beings.<sup>210</sup>

¶74

Criminal prosecutions of named perpetrators suffer from similar shortcomings. Theoretically, the prosecutor represents the interests of the entire community in a criminal proceeding against an individual criminal actor; the very idea behind public criminal prosecutions is that the defendant’s crime injures not only the victim or victims, but society as a whole.<sup>211</sup> But while prosecutions are social, punishment is individual. Sanctions for criminal activity in the U.S. criminal justice system are based mainly on a retributive theory of punishment that stigmatizes and isolates the individual defendant from the rest of society.<sup>212</sup> In the words of the GTRC: “The retributive justice system is by nature oriented toward the individual, and separates that individual from the

<sup>206</sup> See, e.g., Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 374–80 (1987) (acknowledging the difficulty of identifying victim and perpetrator groups and arguing for a “collective sense of reparations rather than the individual sense of a typical legal claim”).

<sup>207</sup> *Id.* at 375.

<sup>208</sup> Farmer-Paellman Complaint, *supra* note 140.

<sup>209</sup> Without a doubt, the legacy of slavery in the United States has impacted the African American community in distinct ways. My point here is that other groups, including other racial minorities, women, and the queer community, have also been and are currently harmed by the history of institutionalized slavery and the race, class, and gender subordination policies that accompanied it. Cf. “COLORED MEN” AND “HOMBRES AQUÍ”: HERNANDEZ V. TEXAS AND THE EMERGENCE OF MEXICAN AMERICAN LAWYERING (Michael A. Olivas, ed., 2006) (analyzing *Hernandez v. Texas* as a civil rights case and a pre-cursor to *Brown v. Board of Education*); Ian Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in RACE LAW STORIES 273, 301–06 (Rachel F. Moran & Devon W. Carbado eds., 2008) (arguing that *Hernandez* defies simple classification as a race equality case, and instead suggesting that it exemplifies the Warren Court’s understanding of the Constitution as promoting anti-subordination as a guiding principle in the law); Richard Koritz & Deborah Kelley, Remarks at Public Hearing #3 of the Greensboro Truth and Reconciliation Commission (Sept. 30, 2005), available at <http://www.greensborotrc.org/koritzkelly.doc> (testifying to the Commission about the lasting impacts of November 3rd on Latino workers in North Carolina).

<sup>210</sup> See IFILL, *supra* note 122, at 154–60.

<sup>211</sup> See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 10–14 (2007) (explaining how the concept and role of the prosecutor developed in the colonies and has carried on to today’s criminal justice system).

<sup>212</sup> See WAYNE R. LAFAYE & DAVID C. BAUM, PRINCIPLES OF CRIMINAL LAW 25–28 (2003); GTRC REPORT, *supra* note 163, subsec. Recommendations, at 200. The focus on individual responsibility after the 1994 genocide in Rwanda has been similarly critiqued for reifying the notion that “the Hutu will remain killer and the Tutsi victim.” IFILL, *supra* note 122, at 122–23.

community in which both perpetrators and victims live. In so doing, this system fails to address wider community harms.”<sup>213</sup>

¶75 An inclusive model, by contrast, seeks to address wider community harms by eliminating the partisanship inherent in litigation. In the Inclusive Model for Social Healing, where a group qua group has been injured by some systematic, often government-backed program, society as a whole is understood as having been damaged by the injustice. The GTRC, for example, identified five individuals who were directly impacted by the shooting tragedy of November 3, 1979 (the five who were killed), but specifically acknowledged that a much larger number were indirectly affected by the tragedy.<sup>214</sup> Included in the GTRC’s calculation of others indirectly affected were the Klan and members of the Nazi party who instigated the shooting; members of the CWP who were afterwards stigmatized as troublemakers; grassroots organizers; workers and other low income residents who lost opportunities to work towards change; and Greensboro residents in general,<sup>215</sup> who had lived segregated from their neighbors by a cloud of distrust, misunderstanding, and suspicion.<sup>216</sup>

¶76 Further, the Inclusive Model for Social Healing acknowledges that group harms not only affect those living at the time of the incident, but can impact those born into a ruptured community. In the Epilogue to the Tulsa Commission’s report, State Senator Maxine Horner explained:

There is an intergenerational effect from the 1921 Tulsa race riot that is the unconscious transmittal of an experience that is most mysterious and intriguing. . . .

[P]eople who have been through a shared experience such as . . . the “riot” . . . emerged haunted as a result of that experience. The way they relate to their children and grandchildren . . . is not how they may have related had it not been for that experience.<sup>217</sup>

¶77 The Inclusive Model for Social Healing, as manifested through a forum like a truth commission, provides a space for and invites widespread participation from all affected communities and encourages participants to make discoveries linking past harms to consequences felt in the present day.

¶78 The comparison that this Article draws between victims of racial injustice and men suspected of conspiring to commit grievous acts of terrorism against the U.S. public is perhaps an uncomfortable one. Surely, the descendants of former slaves and Japanese Americans who were interned during World War II do not share the same moral status as suspected terrorists.<sup>218</sup> The focus of the Inclusive Model for Social Healing, however, is

<sup>213</sup> GTRC REPORT, *supra* note 163, subsec. Recommendations, at 200.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> Maxine Horner, *Epilogue*, in TULSA REPORT, *supra* note 167, at 177, 177.

<sup>218</sup> Of the prisoners captured on the battlefield in Afghanistan and Iraq, only a small fraction have actually been charged with terrorism crimes. The vast majority of prisoners detained at U.S. facilities since 9/11 have been released to their home countries or amenable third party nations. *See The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/guantanamo> (last visited Mar. 21, 2010).

not on individuals, but on long-term justice and an intention to heal social wounds inflicted by violations of the rule of law. Inclusive forums, such as truth commissions, invite mass participation of the public with the goal of crafting a collaborative national narrative that includes the voices of victims, of perpetrators, and also of bystanders or members of future generations. The Inclusive Model for Social Healing rejects the “us versus them” rhetoric, and instead seeks to hold all parties accountable for their involvement in social wrongs.

¶79 The narrative opportunity that a truth commission provides is a principal means for achieving justice, redress, and ultimately reconciliation. The post-9/11 era narratives are dominated by the voices of al-Qaeda promoting war and of U.S. leaders seeming to condone torture. These narratives are embedded with the rhetoric of exclusivity, of “us versus them.” Counter-narratives, ones that contain the testimonies of prisoners who have experienced torture and those who have tortured, challenge the dominant narratives and create an inclusive space for moderate Muslims and the U.S. public to find common ground.

¶80 While the narrative opportunity is potent in truth-commission-style fora, in the Inclusive Model for Social Healing, redress also encompasses a variety of other reparative acts or methods that are designed to repair social harms. Truth commissions are simply a first step. Other reparative acts that might accompany or follow truth commissions include financial compensation, as was provided to Japanese American WWII internees;<sup>219</sup> public memorials designed to commemorate a social harm; and education campaigns to teach the public about the past injustice with a view toward preventing a similar occurrence in the future. Ensuring that individuals who were responsible for creating or enabling widespread social harms do not maintain positions of power in government is another critical reparative act.<sup>220</sup>

¶81 A truth commission that would provide redress for those who have suffered from the post-9/11 torture program is a critical testing ground for this new model, especially as judicial avenues for relief appear blocked. The federal courts have consistently dismissed civil actions alleging torture and other brutal treatment brought by former detainees against government officials.<sup>221</sup> Recourse in criminal court appears to be likewise unavailable.<sup>222</sup> Finally, despite concluding that the authors of the infamous torture memos had relied on flawed legal reasoning, the Office of Professional Responsibility’s recent report forecloses the possibility that John Yoo, Jay Bybee, and other Justice Department lawyers will be subject to disciplinary action for creating the torture program.<sup>223</sup> The time to press for alternative forms of redress is now.

<sup>219</sup> Similarly, after a Florida commission delivered its report on the Rosewood Massacre, the state legislature voted to set aside funds to compensate victims. See IFILL, *supra* note 122, at 119; C. Jeanne Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 FLA. ST. U. L. REV. 503 (1994).

<sup>220</sup> See MINOW, *supra* note 181, at 136–37 (discussing lustration programs).

<sup>221</sup> See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 563–64, 567, 586–87 (2d Cir. 2009) (en banc).

<sup>222</sup> See Press Release, The White House, Statement of President Barack Obama on Release of OLC Memos, *supra* note 126.

<sup>223</sup> Eric Lichtblau & Scott Shane, *Report Faults 2 Who Wrote Terror Memos*, N.Y. TIMES, Feb. 20, 2010, at A1, available at 2010 WLNR 3603950.

## IV. A TRUTH ABOUT TORTURE COMMISSION

¶82 More than any currently available redress option, a truth commission has the most potential to repair the harms caused by the dual war-bad apples narrative by exposing the real harms to individuals, the flaws in the legal reasoning behind the OLC memos, and how harsh interrogation techniques approved for use on specific detainees quickly migrated to other U.S. prisons (like Abu Ghraib).<sup>224</sup> As current and former military officials Michael Mullen and Alberto Mora have made clear, our torture policies abroad have made us all less safe at home.<sup>225</sup> We are more vulnerable to attacks from extremists who see confirmation of the al-Qaeda “us versus them” narrative in U.S. government-sponsored torture.<sup>226</sup> Our service members are more vulnerable also, because when the adversary knows that the United States tortures, they are less willing to surrender, and therefore will fight harder to avoid being captured.<sup>227</sup> We should be interested in repairing these social harms because we are all in more danger as a result of the torture program.

¶83 As discussed in Part III, truth commissions are part of a new model of inclusive social healing. Here, I will provide some details about my proposal for a Truth About Torture Commission (TATC), and then I will consider both the benefits and disadvantages of this mode of reparation.

¶84 While much of the general public’s awareness about truth and reconciliation commissions comes from international bodies, special commissions with the power to investigate the root causes of local and national crises are not uncommon in the United States.<sup>228</sup> A truth commission is an official investigation of a grave social injustice, often perpetrated by or acquiesced in by the government.<sup>229</sup> Although most truth commissions have the authority to gather evidence, hear witness testimony, and create a record of it all, they do not generally have the power to initiate criminal prosecutions against perpetrators.<sup>230</sup> Truth commissions are based in a model of restorative justice, and their existence is premised on the idea that a community must directly confront the errors of its past and do what it can to remedy them in order to move forward.<sup>231</sup> Eventually, an

<sup>224</sup> Kelman, *supra* note 24, at 124–25; *see also* MCCOY, *supra* note 13.

<sup>225</sup> Michael Mullen, *Building Our Best Weapon*, WASH. POST, Feb. 15, 2009, at B7, *available at* 2009 WLNR 2973307; *see also* Interview by Torturing Democracy with Alberto Mora, Gen. Counsel, U.S. Navy (2001–2006) (Sept. 17, 2007),

[http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/alberto\\_mora.html#constitution](http://www.gwu.edu/~nsarchiv/torturingdemocracy/interviews/alberto_mora.html#constitution) (edited transcript) (“I think overall the legal decisions, certainly in respect to detainee treatment and interrogation, have been unwise and damaging to our country. . . . [T]hese decisions have been counterproductive of US goals in the war on terror, and have made us less safe, not more safe.”).

<sup>226</sup> *See* Matthew Alexander, *I’m Still Tortured by What I Saw in Iraq*, WASH. POST, Nov. 30, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/28/AR2008112802242.html>.

<sup>227</sup> Matthew Alexander, *Shaping America’s Future Leaders*, ACLU BLOG OF RIGHTS (June 15, 2009, 3:34 PM), <http://www.aclu.org/2009/06/15/shaping-americas-future-leaders>.

<sup>228</sup> *See* Lance Cole, *Special National Investigative Commissions: Essential Powers and Procedures (Some Lessons from the Pearl Harbor, Warren Commission, and 9/11 Commission Investigations)*, 41 MCGEORGE L. REV. 1 (2009) (detailing the commissions that investigated the Pearl Harbor attack, the assassination of President John F. Kennedy, and the 9/11 attacks).

<sup>229</sup> MINOW, *supra* note 28, at 53–56.

<sup>230</sup> *Id.* at 24–27.

<sup>231</sup> “[S]ince it is deemed necessary to establish the truth in relation to past events as well as the motives for, and circumstances in which, gross violations of human [rights] have occurred, and to make the findings



accounting of how the charged injustices came to be will be publicized and that report is meant to serve at least two functions: one historic, as it produces an authoritative account of what happened and how it happened; and another expressive, as a cautionary tale to prevent future abuses.<sup>232</sup>

¶85 Several members of the U.S. Congress have already expressed their support for a truth commission to investigate the post-9/11 torture program.<sup>233</sup> Representative John Conyers of Michigan has proposed a bill to “investigate the broad range of policies” of the Bush administration, including “the use by the United States Armed Forces or the intelligence community of enhanced interrogation techniques or interrogation techniques not authorized by the Uniform Code of Military Justice[.]”<sup>234</sup> Conyers’ bill contains a provision for a bipartisan commission whose duties would include “investigat[ing] relevant facts, circumstances and law surrounding” the torture program and reporting their findings, conclusions, and recommendations to the President and to Congress.<sup>235</sup>

¶86 Similarly, my proposal requires that the TATC should be empowered to: (1) investigate and develop an official record concerning the conception, implementation, and execution of the post-9/11 U.S. torture program; (2) provide an opportunity for victims, perpetrators, and other community members to publicly testify to the impact that torture has had on their lives; (3) make recommendations for community redress, including criminal prosecution for the government officials responsible for conceiving and implementing the torture program, public education programs, and financial compensation to victims; and, (4) create a forward-looking plan to ensure that similar abuses do not happen again.

¶87 To consider how the TATC might operate, and also what challenges it might confront, the lessons of the paradigmatic TRC, the South African Truth and Reconciliation Commission (SATRC) are instructive. The SATRC was established in South Africa in 1995 during its transition out of the apartheid government.<sup>236</sup> A result of compromises between the National Party and African National Congress (ANC), the TRC established a forum for victims to bear witness to the abuses they suffered and for

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known in order to prevent a repetition of such acts in the future.” *Promotion of National United and Reconciliation Act 34 of 1995 [Excerpts]*, reprinted in *THE HANDBOOK OF REPARATIONS* 770, 771 (Pablo De Grieff ed. 2006) [hereinafter *HANDBOOK*].

<sup>232</sup> Professor Phelps asserts that truth commission reports can also have a constitutive purpose. PHELPS, *supra* note 21, at 79–82. In the Argentina context, for example, the National Commission of the Disappeared’s *Nunca Más* report served as a promise to the Argentine people that the abuses that had accompanied military rule would never happen again in the new era of democratic government. *Id.* at 82–83.

<sup>233</sup> William McGurn, *Torture and the ‘Truth Commission,’* WALL ST. J., Apr. 28, 2009, at A11, available at 2009 WLNR 8035420 (identifying Senators Patrick Leahy (D., Vt.), Nancy Pelosi (D., Calif.), and Representative John Conyers (D., Mich.) as supporters of a truth commission).

<sup>234</sup> H.R. 104, 111th Cong. (2009) (establishing a national commission on presidential war powers and civil liberties). H.R. 104 had fifty co-sponsors. *Bill Summary & Status, 111th Congress (2009–2010)*, H.R. 204, LIBRARY OF CONG., <http://www.thomas.gov/> (follow “Search Bill Text from Multiple Congresses” hyperlink; then check Congress only “111 (2009–2010)”; then search “Enter Word/Phrase to Search Bill Text” for “HR 104”; then follow “H.R.104.IH” hyperlink; then follow “Bill Summary and Status” hyperlink; then follow “Cosponsors” hyperlink).

<sup>235</sup> H.R. 104 § 2(a).

<sup>236</sup> Christopher J. Colvin, *Overview of the Reparations Program in South Africa*, in *HANDBOOK*, *supra* note 231, at 176, 177–81.

perpetrators to describe their crimes.<sup>237</sup> The SATRC was undoubtedly a product of its historical, political, and cultural context. In South Africa, ANC leaders were eager for a swift and smooth transition out of apartheid to a new democratic multi-party system.<sup>238</sup> The Act creating the SATRC was entitled the “Promotion of National Unity and Reconciliation Act of 1995,” an indication of the national goals considered priorities at the time.<sup>239</sup> To promote unity and reconciliation, the TRC Act provided for full amnesty from both criminal and civil liability.<sup>240</sup>

¶88 Following this brief historical sketch of the SATRC, some legitimate criticisms of the use of truth commissions in the United States become apparent. This Part briefly addresses two. First, truth commissions are not part of U.S. legal or social culture; they have only been used to promote reconciliation in countries that were undergoing dramatic political upheavals. This critique is closely related to the second: that amnesties are anathema to U.S. rule of law values.

¶89 First, the international models for truth commissions emerge from specific transitional justice contexts. In erecting its TRC, for example, South Africa was forced to confront not only the lack of political will to prosecute the individuals responsible for grave human rights abuses, but also the fact that its national institutions were simply not equipped to handle the tremendous amount of litigation that would accompany those prosecutions.<sup>241</sup>

¶90 The same simply cannot be said of the United States. Our representative democracy has been intact since 1776 and at no time, even during the Civil War, have the federal courts closed their doors.<sup>242</sup> However, truth commissions or commissions of inquiry are not without precedent in the United States.<sup>243</sup> In addition to the TRRC and GTRC described in Part II.B., the 9/11 Commission is a well-known example.<sup>244</sup>

¶91 The second critique about truth commissions involves the question of amnesty. The perception is that truth commissions are premised on amnesties for perpetrators. The SATRC, for example, had the power to grant full amnesties for criminal and civil prosecution for perpetrators of “gross violations of human rights associated with a

<sup>237</sup> *Id.*

<sup>238</sup> NAOMI KLEIN, *THE SHOCK DOCTRINE: THE RISE OF DISASTER CAPITALISM* 199–205 (2007). Klein suggests that, in the ANC’s haste to claim political leadership of the country after the 1994 elections, party leaders were “outmaneuvered” on key economic policy issues. *Id.* at 202.

<sup>239</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 (S. Afr.), available at [http://us-cdn.creamermedia.co.za/assets/articles/attachments/02669\\_promofnatuni&reca34.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/02669_promofnatuni&reca34.pdf).

<sup>240</sup> *Id.* at ch. 4 para. 20(7)(a) (empowering three committees “to receive and consider applications for amnesty from those who had perpetrated gross violations of human rights associated with a ‘political objective’”).

<sup>241</sup> See Minow, *supra* note 28, at 24.

<sup>242</sup> See *Ex parte Milligan*, 71 U.S. 2, 3 (1866).

<sup>243</sup> See discussion *supra* Part III.B. The practice of establishing special national investigative commissions in the United States dates back to Washington’s presidency, and is likely derived from the tradition of royal commissions for the same purpose in England. See Cole, *supra* note 228 (providing historical background of three investigative commissions tasked with producing official reports regarding the performance of the federal government before and during moments of national crises: the Roberts Commission (Pearl Harbor), the Warren Commission (the Kennedy assassination), and the 9/11 Commission (the 9/11 terrorist attacks)). Cole distinguishes investigative commissions or “boards of inquiry” from “policy” commissions (which present policy proposals or advice), “administrative” commissions (charged with proactively finding ways to improve the administration of government). *Id.* at 5–6.

<sup>244</sup> See 9/11 COMMISSION REPORT, *supra* note 42.

‘political objective.’”<sup>245</sup> Contrary to popular perception, however, amnesties were not automatically granted by the SATRC, and were conditioned upon full disclosure.<sup>246</sup>

¶92

The amnesty aspect of the SATRC was attacked early in its tenure. The widows of men killed by apartheid security forces argued that the amnesty provisions in the Act violated Section 22 of the Constitution which provides that every person “shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial forum.”<sup>247</sup> In a unanimous decision, the Constitutional Court rejected the plaintiffs’ claims, reasoning that the amnesty provision furthered the goals of unity and reconciliation by making it possible for the stories of human rights violations to be told.<sup>248</sup> In selecting the legal mechanisms to make those goals possible, the South African parliament was entitled to “favour ‘the reconstruction of society’ involving in the process a wider concept of ‘reparation.’”<sup>249</sup> In upholding the state’s immunity for civil claims under the amnesty provisions, Judge Ismail Mahomed concluded, “the epilogue to the Constitution authorised and contemplated an ‘amnesty’ in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future.”<sup>250</sup>

¶93

The question of amnesty is a complicated one and this Article does not propose a simple solution. But Senator Patrick Leahy, who has spoken in favor of a truth commission, explained why he believed immunity from prosecution for low- or mid-level actors might be appropriate.<sup>251</sup> He said: “We don’t want another Abu Ghraib.”<sup>252</sup>

<sup>245</sup> Colvin, *supra* note 236, at 181.

<sup>246</sup> Promotion of National Unity and Reconciliation Act 34 of 1995 ch. 4 para. 20(1)(c) (S. Afr.), available at [http://us-cdn.creamermedia.co.za/assets/articles/attachments/02669\\_promofnatuni&reca34.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/02669_promofnatuni&reca34.pdf). Out of 7,112 applications for amnesty, 849 were granted and 5,392 were denied. See *Amnesty Hearings & Decisions*, TRUTH & RECONCILIATION COMMISSION, <http://www.justice.gov.za/trc/amntrans/index.htm> (last visited Nov. 7, 2009).

<sup>247</sup> See S. AFR. (INTERIM) CONST., 1993 § 22, available at <http://www.info.gov.za/documents/constitution/93cons.htm#SECTION22>.

<sup>248</sup> *Azanian Peoples Org. (AZAPO) v. The President of the Republic of S. Afr.* 1996 (4) SA 671 (CC) at 40, 44–45 paras. 45, 50–51 (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2529.PDF>.

<sup>249</sup> *Id.* at 40, 44 paras. 45, 50.

<sup>250</sup> *Id.* at 44 para. 50; see also Colvin, *supra* note 236, at 185 (commenting that, in upholding the amnesty provisions against challenge, the court effectively declared that “truth was a constitutionally protected mission of the State and that the withdrawal of the amnesty provision would have removed the incentive for truth telling”).

<sup>251</sup> Transcript of television broadcast, *The Rachel Maddow Show*, MSNBC, (Mar. 4, 2009), available at 2009 WLNR 4192412.

MADDOW: It sort of seems like the truth here has already been pursued through a lot of different means. And maybe, what we need to pursue now is not truth but consequences. What do you think about that?

LEAHY: Well, of course, I’m a former prosecutor. My natural instinct is always to go for prosecution. But, I’m afraid, in cases like this, one may take 10 years and still not know what happened. I also look at what happened after Abu Ghraib, most of the people prosecuted were corporals and sergeants.

It always seems to that these kinds of things, when you go after that, you get somebody way down low on the totem pole. You don’t get the people making the decisions. I want to find out who the people were making the decisions. I don’t think we are ever going to get the full truth unless we do it this way.

Senator Leahy was referring to the fact that in the aftermath of the Abu Ghraib prison abuse scandal, sergeant was the highest rank of those prosecuted by military officials.<sup>253</sup> To avoid this inequity in the future, TATC commissioners could be empowered to grant immunity in exchange for testimony against superior officers.

¶94

It is critical to understand that the goals and methods of criminal prosecutions and truth commissions are quite distinct. In attempting to achieve accountability, the criminal prosecution route has several advantages. During a criminal trial, the community's attention is focused on the individual accused.<sup>254</sup> The prosecution's aim is to prove each criminal charge beyond a reasonable doubt, and a jury of the defendant's peers represents the community as it weighs the evidence presented.<sup>255</sup> The proceedings are carried out in a regularly constituted public forum, with rules of evidence and procedure that are enforced to ensure a fair trial that protects the individual defendant's due process rights.<sup>256</sup> But, the only measure of success in a criminal trial of an accused torturer is the conviction and sentencing of an individual perpetrator. As Professor Martha Minow explains: "Trial records do not seek a full historical account beyond the actions of particular individuals. A [truth] commission, though, can try to expose the multiple causes and conditions contributing to genocide and regimes of torture and terror."<sup>257</sup>

¶95

As a means of achieving social healing, pursuing charges in the criminal justice system has distinct disadvantages. First, a public airing of charges is not guaranteed. A defendant may elect to plead guilty to charges, thus avoiding a public trial altogether.<sup>258</sup> During a criminal trial, the federal torture statute defines the offense and a prosecutor is tasked with proving each element of that crime beyond a reasonable doubt. Rules of evidence and criminal procedure strictly limit what type of evidence is entered into the record. Prosecution witnesses may be given leave to tell the court about the physical acts

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....

MADDOW: Senator Leahy, one last, just specific question. Are you rethinking the option of offering immunity in exchange for testimony? That seems to be the focus of much of the criticism or resistance to the proposal?

LEAHY: Well, some of the same people have said they don't like immunity, although they have said they would support my commission. If that is the only way of getting facts, yes. But it should be done very, very carefully, only after consultation with the Department of Justice.

And interestingly enough, as a testimony [] said today, even though they had that option in the 9/11 Commission, they never had to use it. That gave me a lot of hope; we may never need to do that.

*Id.*

<sup>252</sup> Charlotte Dennett, *Leahy Bails on 'Truth Commission' Plan*, CONSORTIUMNEWS.COM, Apr. 1, 2009, <http://www.consortiumnews.com/2009/040109b.html>.

<sup>253</sup> Schmitt, *supra* note 108.

<sup>254</sup> WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 15 (5th ed. 2009).

<sup>255</sup> *Id.*

<sup>256</sup> U.S. CONST. amends. VI, XIV § 1; *see* LAFAVE, ISRAEL, KING & KERR, *supra* note 254, at 1133, 1159–66.

<sup>257</sup> MINOW, *supra* note 181, at 78.

<sup>258</sup> *See* FED. R. CRIM. P. 11(c)(1).

visited upon them by the accused and about any long-term psychological impacts of that treatment, but their testimony would be subject to intense scrutiny through cross-examination by defense counsel.<sup>259</sup> A torture victim would be required to identify each individual perpetrator and to assign blame for criminal acts to that particular defendant.<sup>260</sup> The court would likely exclude evidence regarding other aspects of the prisoner's daily life in U.S. custody.<sup>261</sup> At some point, a concern about undue prejudice would limit the number of prosecution witnesses.<sup>262</sup>

¶96 Unlike a criminal trial, the primary goal of the TATC would not be to prosecute individuals for violations of the torture statute. Instead, the TATC would have the latitude to pursue all investigative leads. Because the goal of a truth commission is not the prosecution of individuals, the scope of "relevant" testimony is infinitely broader. Participants would not be prohibited from communicating the intricacies of their particular experiences in the words of their choosing, in the order of their choosing, with the emphasis of the choosing.<sup>263</sup> It is in this way that the TATC would encourage the formation of a counter-narrative. At a truth commission, participants are encouraged to speak the truth of their own experiences, whether lived as victims or perpetrators, without the interruption of cross-examination or evidentiary objections that they would likely experience during testimony at a criminal or civil trial.<sup>264</sup>

¶97 Furthermore, the class of eligible participants in the TATC would be much larger than in a criminal trial.<sup>265</sup> The TATC would likely hear testimony from not only victims and perpetrators, but also from others who may not have been directly impacted by the post-9/11 torture program.<sup>266</sup>

¶98 In my proposal, the TATC would not supplant criminal prosecutions, but would satisfy the need for a full historical accounting. In the words of the Center for Human Rights and Global Justice, another proponent of a truth commission: "Because criminal prosecutions are aimed at establishing the culpability of individuals, rather than exposing 'system crimes,' a broader strategy is necessary to expose the systematic nature of the crimes and augment criminal prosecutions."<sup>267</sup>

¶99 In 2006, the community of Greensboro, North Carolina utilized a truth commission to conduct an investigation into the November 3rd Massacre.<sup>268</sup> Six men were tried in

<sup>259</sup> See FED. R. EVID. 611. Cf. PHELPS, *supra* note 21, at 62 (describing a victim's fear of re-victimization during a "rigorous cross-examination in a defense lawyer's all out effort to cast doubt on a witness's credibility").

<sup>260</sup> See FED. R. CRIM. P. 4.

<sup>261</sup> See FED. R. EVID. 402.

<sup>262</sup> See MINOW, *supra* note 181, at 57–58.

<sup>263</sup> See PHELPS, *supra* note 21, at 66.

<sup>264</sup> See *id.* at 82–90 (describing Argentina's National Commission on the Disappeared investigation and interviews).

<sup>265</sup> PHELPS, *supra* note 21, at 63.

<sup>266</sup> See *id.* at 63 ("In situations faced by transitional democracies after massive oppression, many perpetrators and victims will never enter a courtroom, will never have an opportunity to tell or hear the truth . . . . Many victims may have no official space in which to tell the stories of the harms that befell them and no master narrative of oppression emerges.").

<sup>267</sup> CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, NYU SCH. OF LAW, THE RIGHT TO TRUTH AND JUSTICE: ACCOUNTABILITY FOR U.S. ABUSES IN ITS "WAR ON TERROR," <http://www.chrgj.org/projects/docs/positionpaper.pdf> (last visited Oct. 22, 2010).

<sup>268</sup> See GTRC *Mandate*, *supra* note 165.

criminal court for the killings, but claimed self-defense and were each acquitted by all-white juries.<sup>269</sup> The GTRC's mandate was not to revisit the criminal charges against the individual Klansmen, but rather to investigate whether and to what extent state actors played a role in encouraging the killings or simply passively allowed them to happen.<sup>270</sup> The mandate specifically rejected "revenge or recrimination" and focused instead on the goal of "[h]elping facilitate changes in social consciousness and in the institutions that were consciously or unconsciously complicit in these events, thus aiding in the prevention of similar events in the future."<sup>271</sup> The records produced as a result of the GTRC's efforts to examine the causes of the massacre and thereafter to make recommendations for community healing reveal a cacophony of voices, including those of the CWP, members of the Klan, family members of those killed, community members, journalists, and academics. During the GTRC public hearings, Joyce Johnson, a Greensboro resident, observed: "You know everybody won't talk to the commission to open up dialogue or what have you. But they carry that weight of the lies and the misspeaking that occurred in this city."<sup>272</sup>

¶100 There are substantial hurdles that a truth commission would have to overcome to be successful. My proposal relies on the willing participation of a large number of people. It requires that prisoners and their captors speak out. It contains the hope that other community members will join the chorus. Perhaps Arab- and Muslim-Americans, or even those perceived to be Arab and Muslim, who have experienced discrimination or harassment after the 9/11 attacks will speak out. Perhaps religious leaders in the Islamic community and those of other denominations who counsel peace will speak out. Perhaps survivors of those who died in the 9/11 attacks will speak out. As Professor Sherrilyn A. Ifill cautions: "The alternatives—silence, lies, disconnection, and continued cycles of violence—make the project of reconciliation an urgent one."<sup>273</sup> In exploring the possibility of challenging terrorist recruitment rhetoric and seeking some reconciliation for the social harms of state-sanctioned torture, there may not be a viable alternative.

## V. CONCLUSION

¶101 As Professor Alfred L. Brophy has noted: "The future of the [reparations] movement will be determined in large part by how successfully reparations proponents can make a compelling moral argument for reparations and promote political support for the concept."<sup>274</sup> In the preceding pages, this Article has argued that establishing a truth commission to inquire into the post-9/11 torture program and inviting testimony from a broad spectrum of individuals injured by government-sponsored torture has the potential to begin the long process of healing social wounds and, further, to provide a counter-narrative strategy in the U.S. efforts against Islamist extremists.

¶102 No redress proposal will be successful without the broad support of the public. "For this reason, repairing the harm caused by racial violence is not a case of one size fits

<sup>269</sup> GTRC REPORT, *supra* note 163, at 258, 276.

<sup>270</sup> See GTRC Mandate, *supra* note 165 ("The Commission will attempt to learn how persons and groups came to be directly or indirectly involved in these events.").

<sup>271</sup> *Id.*

<sup>272</sup> GTRC REPORT, *supra* note 163, at 168 (quoting Joyce Johnson, a former CWP member).

<sup>273</sup> IFILL, *supra* note 122, at 124.

<sup>274</sup> BROPHY, *supra* note 130, at 4.

all,” as Professor Ifill argues. “Nor can it be effectively imposed from the outside.”<sup>275</sup> The next step in the process of redress is to seek out community support for the truth commission proposal contained in this Article.

¶103

On its own, a truth commission is not the sole answer for the question of redress for victims of U.S. torture. Used in conjunction with other modes of reparation, however, the Truth About Torture Commission is a solid first step towards social healing. The nation needs healing. Bush administration officials corrupted the U.S. narrative of rule of law by reasoning end runs around domestic and international prohibitions against torture. A truth commission, with a mandate to investigate these abuses and to take testimony from victims and perpetrators alike, is a first step towards rewriting a national narrative that exalts democratic participation, the rule of law, pluralism, and an open society. The Truth About Torture Commission is likely to be filled with a multitude of voices, some plaintive, some enraged, others worried, even others suspicious. But a nation that can celebrate that cacophony is ultimately communicating a message of harmony to the world.

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<sup>275</sup> IFILL, *supra* note 122, at 150–52 (making the case for “community conferencing” to address the history of lynching in the United States).